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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

ANNA TWINS SPOTTEDWOLF, et al.,

Petitioners,

v.

WOODS PETROLEUM CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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230 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the en banc decision of the United States Court of Appeals for the Tenth Circuit exalts the regulator role of the Secretary of the Interior over his fiduciary duty to Indian mineral owners, and therefore deprives the Secretary of his discretion in protecting the Indian mineral owners' economic interests.

2. Whether the Tenth Circuit's en banc decision:

   a. exceeds the narrow scope of judicial review prescribed by the Administrative Procedure Act;

   b. fails to defer to the federal agency's expertise and experience in protecting the economic interests of Indian mineral owners; and

   c. substitutes that appellate court's own judgment for the agency's well-reasoned and authoritative administrative decision.

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LIST OF PARTIES TO PROCEEDING

Petitioners are Indian mineral owners, Anna Twins Spottedwolf, Eleanor Stoneroad, Victor Stoneroad and Leroy Stoneroad, and their oil and gas lessee, Tomlinson Properties, Inc., a Texas corporation ("Tomlinson"), defendants-appellees in the litigation below. Tomlinson has no corporate parent or subsidiaries.

Other defendants-appellees in this litigation, not joining in this Petition, are Timothy Nibs, Wisdom A. Nibs, Jr., Reginald R. Nibs, Ronald Leroy Nibs, Elaine Shirley Nibs Mayes, D'Ann Nibs, Lowell Nibs, Theodore Raymond Nibs, Wisdom Nibs, Sr., Brenda Tonips Nibs, Michael Nibs, Solomon Stoneroad, Joe Hicks, Patrick B. Spottedwolf, Lucian M. Twins, Joyce M. Twins, Minita Twins Running-water, Wesley Robert Twins, Lucinda Amelia Sweetwater, Mariam Mann Twins, McClain H.

Twins, Jr., Marion M. Twins, Michael Wayne Twins, and the United States Department of Interior.

Respondents are Woods Petroleum Corporation ("Woods"), Raytex Resources Incorporated, Mid-Con Central Exploration Company and Mustang Production Company, and their respective successors and assigns, plaintiffs-appellants in the litigation below.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

1. Administrative decision of Ross O. Swimmer, Assistant Secretary -- Indian Affairs, United States Department of the Interior, dated May 15, 1986 (reproduced in Petitioners' Appendix ["Pet. Apx."] at 1-1 et seq.).

2. Order of the United States District Court for the Western District of Oklahoma (the "Trial Court"), entered in Case No. CIV-86-1623-A (the "District Court Action") on February 22, 1988 (reproduced in Pet. Apx. at 2-1 et seq.).

3. Judgment on Plaintiffs' Claims entered by the Trial Court in the District Court Action on January 24, 1992 (reproduced in Pet. Apx. at 3-1 et seq.).

4. Order on Rehearing En Banc of the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit") entered in Case No. 92-6053 on February 9, 1995 (reproduced in Pet. Apx. at 4-1 et seq.), published at 47 F.3d 1032 -1054, supplanting previous decision of Tenth Circuit 3-judge panel published at 18 F.3d 854 (supplanted decision not reproduced in Appendix).

STATEMENT OF JURISDICTIONAL GROUNDS

Petitioners seek review by this Court of the Tenth Circuit's Order on Rehearing En Banc entered February 9, 1995. No rehearing has been requested of the Tenth Circuit and no extension of time within which to file a petition for writ of certiorari has been filed with this Court.

This Court has jurisdiction to review the Tenth Circuit's Order on Rehearing En Banc pursuant to 28 U.S.C. § 1254(1).

The following statutes and regulations are involved in this lawsuit:

1. Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396, 396d and 396e (reproduced in Pet. Apx. at 5-1 et seq.).
2. 25 C.F.R. § 212.24(b) (reproduced in Pet. Apx. at 6-1 et seq.).
3. Administrative Procedure Act, 5 U.S.C. §§ 701 - 706 (reproduced in Pet. Apx. at 7-1 et seq.).

CONCISE STATEMENT OF CASE

The "Findings of Fact" segment of the Trial Court's Order entered February 22, 1988 (reproduced in Pet. Apx. at 2-3 et seq.) fairly and accurately develops the factual background and procedural history of the federal agency's administrative ruling which

is the subject of this litigation. For the sake of brevity, such factual and procedural background matters are not restated.

In the course of assembling, reviewing and supplementing an extensive administrative record, the Secretary of the Interior considered all available production, conservation, technical and economic information relevant to a proposed oil and gas lease communitization agreement covering allotted Indian mineral lands. The proposed agreement had been tardily submitted by Woods, acting on behalf of itself and the other respondent oil companies in this matter.

Although the Secretary's technical staff had evaluated various production and conservation matters in its "best interest assessment" generated in considering Woods' proposed communitization agreement, the staff failed to consider the enormous economic benefit of more than $400,000 in new lease bonuses offered by Petitioner Tomlinson to the Bureau of Indian

Affairs (the "BIA") to lease the Indian mineral tracts.

In his thorough, well-reasoned, 7-page decision, the Secretary concluded that Woods had abusively submitted its proposed communitization agreement to the BIA at the "eleventh hour" in order to deprive the Indians of new bonus money, and that approving Woods' proposed communitization agreement was not in the "best interest" of the Indians as required by the Tenth Circuit's decision in Kenai Oil and Gas, Inc. v. Department of Interior, 671 F.2d 383 (10th Cir. 1982).

As a result of the Secretary's decision, Woods' leases expired. The BIA thereafter approved new leases between the Indian mineral owners and Tomlinson, and later approved Tomlinson's proposed communitization agreement covering the same geographic area and underlying geologic formations.

Woods filed an administrative appeal with the Trial Court. Subject matter jurisdiction

of the Trial Court was created by 28 U.S.C. §§ 1331 (federal question) and 1361 (to compel federal agency to perform duty); and also by the Indian Mineral Leasing Act, supra, and the Administrative Procedure Act, supra.

The Trial Court properly constrained its consideration of the federal agency decision to the narrow scope of judicial review permitted by the case law construing the Administrative Procedure Act (specifically, the "arbitrary or capricious" standard stated in 5 U.S.C. § 706[2][A]).

The Trial Court affirmed the Secretary's decision as being both reasonable and reasoned, supported by applicable statutory, regulatory and decisional authorities, in compliance with Kenai, and indisputably in the best economic interest of the Indians. The Trial Court found that no statute, regulation or federal policy constrains the Secretary, as trustee, from disapproving a proposed communitization agreement for the purpose of

obtaining greater revenues for Indian mineral owners.

The Trial Court further rejected Woods' tardy "due process" claim, and ordered that the Indian defendants and Tomlinson be paid their lawful share of production proceeds generated by Woods' producing wells pursuant to Tomlinson's communitization agreement and applicable Oklahoma oil and gas conservation law.

The Trial Court's judgment was appealed by respondent oil companies to the Tenth Circuit pursuant to 28 U.S.C. § 1291.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

Judge Robert Henry has dissented from the Tenth Circuit's en banc decision. See: Pet. Apx. at 4-37 et seq. His 34-page opinion assiduously analyzes and reconciles the respective bodies of federal case law developing the dual roles of the federal government in serving as trustee for Native

Americans and regulating oil and gas leasing and communitization matters involving Indian mineral owners.

Judge Henry's thoughtful and authoritative dissent is joined in by Chief Judge Stephanie Seymour, author of the definitive reported federal case reconciling the ostensible conflict between such dual roles. See: Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., dissenting) (discussing Secretary of the Interior's paramount fiduciary obligations to Indian mineral owners), dissenting opinion adopted as majority opinion as modified, 782 F.2d 855 (10th Cir.) (en banc), cert. denied, 479 U.S. 970 (1986).

Judge Henry's dissent concludes that the Tenth Circuit's en banc decision deprives the Secretary of discretion in considering his primary fiduciary duty -- economic protection of Indian mineral owners, violates the strict

standard of review established by this Court for federal administrative decisions, and is in irreconcilable conflict with the Tenth Circuit's previous rulings in Kenai, supra, and Cheyenne-Arapaho Tribes v. United States, 966 F.2d 583 (10th Cir. 1992), cert. denied, 113 S.Ct. 1642, and 113 S.Ct. 1643 (1993).

For the reasons and based upon the authorities developed by Judge Henry in his dissent, and pursuant to Rule 10.1(c) of the Supreme Court Rules, a writ of certiorari should be granted in this matter because the Tenth Circuit has decided important questions of federal law, as more particularly stated in the "Questions Presented for Review" segment of this Petition, which conflict with applicable decisions of this Court.

The petitioning Indian mineral owners and Tomlinson respectfully urge this Court to adopt the conclusions and rationale, if not the text, of Judge Henry's compelling dissent,

in reinstating the federal agency's administrative decision.

Respectfully submitted,

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MAY 15 1986

Dear Mr. Black:

This letter is my decision on your appeal dated September 6, 1983 on behalf of the Indian mineral owners of the Medicine Woman and Walking Woman allotments. This appeal is from the decision of the Acting Anadarko Area Director of the Bureau of Indian Affairs dated August 17, 1983, which upheld the April 12, 1982 approval of a Communitization Agreement encompassing restricted Indian land held under leases 14-20-205-7048, 14-20-205-7049, and 14-20-205-7050. After a careful economic analysis and after review of the record, I find that the Area Director did not act in the best interest of the Indian mineral owners

when he approved the Communitization Agreement, and therefore I reverse his decision and hold that leases 14-20-205-7048, 14-20-205-7049, and 14-20205-7050 have expired.

Background

Three oil and gas mining leases were entered into by the Indian mineral owners of the Walking Woman Allotment and the Medicine Woman Allotment. The two leases covering the Walking Woman Allotment were approved by the Acting Superintendent, Concho Indian Agency, on February 25, 1977 for a term of five years, and the lease covering the Medicine Woman Allotment was approved on February 28, 1977, also for a term of five years. No oil or gas well was commenced or drilled upon the Indian mineral owners' leases during the primary term of the lease agreements.

Woods Petroleum Corporation (Woods) is the operator of the Meacham #17-1 well, which was drilled on non-Indian lands located in Section

17-12N-17W, Custer County, Oklahoma. Drilling operations were commenced on this well on January 20, 1982 and the well was completed as a producing well on September 10, 1982. The Meacham #17-1 well was drilled under spacing Order No. 207886 of the Oklahoma Corporation Commission providing for a 640-acre unit. The appellants in this case own an undivided 1/2 interest in approximately a 235-acre tract included in the unit.

Woods prepared a Communitization Agreement for this unit and submitted the agreement to the Minerals Management Service which recommended approval of the Agreement as a proper geological and economic unit on February 17, 1982. The Agreement was then transmitted to the Concho Agency office of the Bureau of Indian Affairs which recommended approval of the Agreement on February 22, 1982. On that same day, the Agreement was delivered to the

Anadarko Area Director for his review and approval.

In letters delivered to the Area Director on February 22, 1982, appellants objected to the approval of the Agreement. The appellants asked the Area Director to withhold approval of the Agreement since the current holder of the leases (Woods) had held the leases for nearly five years without commencing to drill, and in view of the fact that the leases were to expire three and six days later. Therefore, the appellants felt it was in their best interest to allow the leases to expire and be put up for bid at the next oil and gas lease sale conducted by the Bureau of Indian Affairs.

The Area Director's staff met with the appellants at their request before taking final action. After this meeting with the appellants, the Area Director approved the

Agreement on April 12, 1982. On June 22, 1983 appellants sent a letter to the Anadarko Area Director appealing the April 12, 1982 action approving the Agreement. The Area Director accepted the appeal as timely filed because appellants had not been given written notice of the decision as required by 25 C.F.R. § 2.4. By letter dated, August 17, 1983 the Area Director reaffirmed his April 12, 1982 approval finding that:

> The Communitization Agreement was received by the Department prior to expiration of the three leases, i.e., February 25, 1982 for 7048 and 7049, and February 28, 1982 for 7050. Drilling had commenced on the unit well in January 1982, and said leases were joined in the unit, based upon a finding that said joinder would be in the best interests of all Indian owners, and same was approved April

12, 1982, by Acting Area Director, Charles V. Delaney.

On September 6, 1983 appellants then filed with the Deputy Assistant Secretary--Indian Affairs their notice of intent to appeal the Area Director's decision approving the Communitization Agreement.

Discussion of Issues

Woods makes several arguments supporting the Area Director's decision. First, Woods argues that this appeal should be dismissed because it was not timely filed. I reject this argument because appellants were never given written notice of the Acting Area Director's decision approving the agreement. 25 C.F.R. § 2.4 provides that:

> Notice shall be given of any action taken or decision made from which an appeal may be taken under the regulations in this part, to any Indian or Indian tribe whose legal rights or privileges are affected thereby.

> This notice shall be in writing and shall be given by the official making the decision or taking the action. Failure to give such notice shall not affect the validity of the action or decision, but the right to appeal therefrom shall continue under the regulations in this part for the periods hereinafter set forth. (Emphasis added).

The appellants did not receive any written notice of the April 12, 1982 decision. The June 22, 1983 appeal was filed immediately after some of the appellants received notice by "word of mouth."

Based on Woods' contention that the appellants were "personally informed" of the decision to approve the Agreement, the Deputy Assistant Secretary--Indian Affairs (Operations) requested by letter dated March 30, 1984, that he be provided with any evidence verifying

that the appellants were notified of the approval of the Agreement. No such evidence was provided by any of the parties. Neither has Woods provided an affidavit or other evidence to support such a claim. Therefore, I find the appeal was timely filed.

Woods contends that the Area Director did not abuse his discretion when he approved the Communitization Agreement. On the other hand, the appellants argue that the Area Director should have exercised his discretion and disapproved the Communitization Agreement allowing their leases to expire for failure to drill, produce, or communitize during the primary term of the lease.

Woods argues that the Communitization Agreement is "reasonable" as contemplated by the underlying leases and that communitization is operationally necessary before the restricted Indian minerals can be developed. Woods

further alleges that disapproval of communitization by the Department would only serve to discourage investors from purchasing restricted Indian leases under the agency's jurisdiction and that actions that drive away purchasers of Indian leases can not be regarded as in the best economic interests of the lessors.[1]

The appellants contradict this argument by submitting that there does exist a potential lessee who is willing to lease the mineral interests of the Indian owners and pay bonus monies in excess of $400,000.00. This amount, plus any royalties the appellants are entitled to, certainly seems to make reversal of the

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[1]Woods further alleges that if the Area Director's decision is reversed, the Indian lessors would be excluded from receiving royalties from the unit wells. The royalty issue is presently before me in a separate appeal; therefore, I decline to address that issue here. The royalties involved shall continue to be maintained in the escrow account already established until the relative rights of the parties have been determined.

Area Director's decision to be in the best economic interest of the Indian mineral owners.

The relationship of the Secretary of the Interior, his agents, and employees, is that of an active trust relationship wherein the Secretary has a fiduciary duty to consider the economic position of the Indian ward. Kenai Oil and Gas, Inc. v. Dept. of the Interior, 671 F.2d 383 (10th Cir. 1982).

> Acting in the capacity as a trustee, the Secretary and his delegate the Superintendent of the BIA, must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues. Kenai, p. 386.

It is clear from Kenai that the Secretary has the discretion to approve or disapprove communitization agreements based on a determination of whether approval would be in the best interests of the Indian lessor. After a careful review of the record, I find that approval of the Communitization Agreement was not in the best interest of the Indian mineral owners and, therefore, I reverse the Area Director's decision. My decision on this issue is dispositive of this appeal. However, Woods raises some other issues which I will address below.

The Agreement was submitted to the Area Director at the eleventh hour on February 22, 1982, only a few days prior to the expiration of the leases. Two of the leases had expiration dates of February 25, 1982 and the other was set to expire on February 28, 1982. Woods alleges that the Agreement was not approved upon receipt because of letters from the

appellants which stated objections to the approval of the Communitization Agreement. Woods submits that this action on the part of the appellants caused delay in approval of the Agreement and that a lease cannot be caused to expire because of the actions of the lessor.

Woods cites Continental Oil Co. v. Osage Oil & Refining Co., 69 F.2d 19 (10th Cir. 1934), in support of this contention. This case holds that a lease expires by its own terms at the end of such term if the lessee is not producing therefrom except in cases where he is prevented from so doing by an act of the lessor.

> Where the lessor refuses to give possession to the lessee or wrongfully obtains an injunction against the lessee restraining operations on the land, it has been held that the definite term will be treated as extended for the length of time that

> the lessee is thus kept out of possession or restrained from operations by the wrongful act of the lessor. Continental Oil Co., at 22, supra.

In the present situation the lessee had five years to commence drilling on the leases in question and did not do so. The appellants have taken no action to prevent or obstruct operations on the lands covered by these leases. Merely voicing objections to the trustee of their land as to the approval of a Communitization Agreement as not in their best economic interest can hardly be construed as preventing the lessee from drilling and producing on the leases. Therefore, I find no conduct on the part of the appellants which could be said to have delayed in any way the lessee from complying with the terms of his lease. Woods was free at all times to commence drilling on the leased lands during the primary terms of the leases. Yet, instead

of drilling on the leases, Woods waited until the eleventh hour to submit a Communitization Agreement for approval. Thus, Woods voluntarily assumed the risk not only that the Department might not act on the Agreement prior to the expiration of the leases, but that the Agreement might be disapproved.

Woods further asserts that the Area Director may approve a Communitization Agreement after the expiration of a lease provided the Agreement was filed with the Agency prior to the expiration of the primary term of any of the leases involved. Woods cites Integrity Oil and Gas Co., 42 IBLA 222 (1979), and the decision in the appeal of GHK, Inc. (Oct. 26, 1982) in support of this contention. Both cases cited do not apply to the issues involved here. In Integrity Oil, the land involved was federal land, not restricted Indian land. The rule in Integrity Oil applies only to federal lands. Laws and

regulations dealing with unitization of federal lands are separate and apart from those dealing with Indian lands. Further, leases involving federal lands only affect the rights of the United States as lessor and the lessee, whomever that might be. However, where Indian lands are concerned, the United States is acting as trustee, rather than on its own behalf. The leasing of allotted land is expressly authorized by 25 U.S.C. § 396. Although the approval of the Secretary is required, he is not the lessor and he cannot grant the lease on his own authority. Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968).

In the appeal of GHK, Inc., the Deputy Assistant Secretary--Indian Affairs (Operations) held that the date of submission of the Agreement would be controlling in any litigation on the issue of timeliness. Since my decision in this case is based on a deter-

mination of whether approval of the Communitization Agreement was in the best interest of the Indian mineral owners, it is unnecessary to address the issue of whether submission of a Communitization Agreement for approval three days prior to the expiration of a lease is timely; therefore, I decline to address this issue.

Woods' next contention is that the Area Director's approval of the Communitization Agreement was proper whether or not the appellants' lands were validly held under lease at the time the Agreement was approved. Woods cites 25 U.S.C. § 396d as authority for the Secretary to approve the communitization of restricted Indian lands even when part of those lands are not presently under lease.

Woods fails to recognize that 25 U.S.C. § 396d applies only to tribal lands. 25 U.S.C. § 396a states clearly that 25 U.S.C. § 396a-396g

applies only to "unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction ..." Allotted lands are not covered by these sections; therefore 25 U.S.C. § 396d is not applicable to the allotted lands involved in this controversy. In any event, 25 U.S.C. § 396d does not require the Secretary to subject a lease to any reasonable cooperative unit; it merely states that it is within the Secretary's discretion to do so.

Woods' final contention is that applicable rules and regulations require approval of the Communitization Agreement. The statute and regulations referred to by Woods in support of this argument are 30 C.F.R. § 221.4, 25 C.F.R. § 172.24(c) and 25 U.S.C. § 396d.[2]

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[2]25 C.F.R. § 172.24(c) has since been redesignated as § 212.24(c) and 30 C.F.R. § 221.4 was removed August 12, 1983 and replaced with 43 C.F.R. § 3161.2. (See 48 FR 36583). Answer Brief of Woods Petroleum Corporation was mailed on September 16, 1983 after the cited section was removed.

Woods contends that under 30 C.F.R. § 221.4 (now 43 C.F.R. § 3161.2) "the Area Director (as the delegate of the Secretary) must consider whether communitization is appropriate in light of geological, operational and conservational factors." Therefore, if the technical requirements have been met, then the Area director is required to approve a communitization agreement. This argument was expressly rejected by the Tenth Circuit Court of Appeals in Kenai Oil and Gas, Inc., supra.

> ...limiting the Superintendent's considerations solely to matters of conservation and production would be inconsistent with his trust responsibilities to the Indians in leasing tribal lands. In light of these trust responsibilities, the Superintendent must take the Indians' best interests into account when making

> any decision involving leases on tribal lands, and has broad discretion to consider all factors affecting their interests.

Woods also cites 25 C.F.R. § 172.24(c) (now 25 C.F.R. § 212.24(c)) as authority for requiring the Area Director to approve the Communitization Agreement.

25 C.F.R. § 212.24(c) provides that:

> All leases issued pursuant to the regulations in this part shall be subject to a co-operation or unit development plan affecting the leased lands, if and when required by the Secretary of the Interior.

This section is strictly discretionary and does not require the Secretary or his representative to approve a Communitization Agreement. It merely says that the Secretary may subject a lease to a co-operation or unit development plan. In making this decision the

Secretary must make a determination as to what is in the best interests of the Indians involved. Kenai Oil and Gas, Inc., supra. In this case I have determined that it is not in the best interest of the Indian mineral owners to have been included in the communitized area.

As discussed earlier, 25 U.S.C. § 396d does not apply to the present circumstances. The authority presented by Woods for their final contention is not on point. Therefore, the Area Director was not required to approve the Communitization Agreement under applicable rules and regulations.

In light of the circumstances surrounding this case and review of the record, I find that the Area Director's decision to approve the Communitization Agreement was not in the best interest of the Indian mineral owners and, therefore, I reverse his decision. Thus,

leases 14-20-205-7048, 14-20-205-7049, and 14-20-205-7050 have all expired by their own terms.

Because of the extended appeal process and the pursuant delay and the potential loss to the appellants if their land remains unleased for any length of time, I direct the Anadarko Area Director to move expeditiously in approving a new lease. The appellants requested in their submittal of April 11, 1986, that the competitive bidding requirements should be waived so that this matter may be swiftly concluded. I grant this request and waive the competitive bidding requirements of 25 C.F.R. § 212.4 and direct that the Indian mineral owners be allowed to negotiate their own lease subject, however, to the final approval of the Secretary of the Interior or his representative.

This decision is final for the Department of the Interior.

Sincerely,

/s/

Ross O. Swimmer

Assistant Secretary--

Indian Affairs

cc: Kent L. Jones

Area Director, Anadarko Area office

FILED
FEB 22 1988
Robert D. Dennis
CLERK, U.S. DISTRICT COURT
BY _____
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WOODS PETROLEUM CORPORATION, et al.,

Plaintiff,

v. No. CIV-86-1623-A

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

ORDER

This case concerns the decision of the Assistant Secretary for Indian Affairs for the Department of the Interior (the Assistant Secretary) to disapprove a communitization agreement extending the primary terms of oil and gas leases on Indian land in Custer County. The plaintiffs Woods Petroleum Corporation (Woods), Raytex Resources Incorporated (Raytex), Mid-Con Central Exploration

Company (Mid-Con), and Mustang Production Company (Mustang) allege that the Assistant Secretary's decision was arbitrary and capricious, contrary to law, an abuse of his discretion, and violative of their rights under the subject leases, various statutes and regulations, and under the Fifth Amendment. They request the Court to quiet their title in the leases, or, in the alternative, to return certain escrowed royalty revenues to them.

The plaintiffs, the Indian defendants, the federal defendants, and the defendant Tomlinson Properties, Inc. have all filed motions for summary judgment. On April 20, 1987, the Court heard oral arguments on the motions, denied the plaintiffs' motion, and granted the defendants' motions in part. Pursuant to the ruling made at that hearing, the Court now issues the following findings of fact and conclusions of law.

Findings of Fact

1. On February 25, 1977, the Superintendent of the Concho Agency of the Bureau of Indian Affairs (BIA) approved oil and gas lease No. 14-20-205-7048 between the Successors and Interest to Walking Woman, deceased, as lessors, and National Cooperative Refinery Association (NCRA) as lessee for a primary term of five years from that date. The lessors conveyed an undivided one-half interest in the E½ E½ SW¼ and in the E½ E½ W½ E½ SW¼ of Section 17, Township 12 North, Range 17 West, Custer County, Oklahoma.

2. On February 25, 1977, the Superintendent of the Concho Agency approved Oil and Gas Lease No. 14-20-205-7049 between the Successors in Interest to Walking Woman, deceased, as lessor, and NCRA, as lessee, for a term of five years from that date. The lessors conveyed an undivided one-half interest in the NW¼ SW¼, the E½ E½ SW¼ SW¼, in

the W½ W½ W½ E½ SW¼, and the W½ E½ W½ W½ E½ SW¼ of the section described above.

3. On February 28, 1977, the Superintendent of the Concho Agency approved Oil and Gas Lease No. 14-20-205-7050 between the Successors in Interest to Medicine Woman, deceased, as lessors, and NCRA, as lessee, for a primary term of five years from that date. The lessors conveyed an undivided one-half interest in the W½ E½ NW¼, and in the W½ NW¼ of the section described above. All three of the leases described above contained "commence clauses" stating that they would continue to be in effect if drilling was commenced before the expiration of their primary terms.

4. NCRA subsequently assigned its interests in these leases to Raytex and Mid-Con. Mid-Con subsequently assigned its interests in the leases to Mustang. These assignments were approved by the BIA.

5. By Order No. 153279, dated May 18, 1979, the Corporation Commission of the State

of Oklahoma formed all of Section 17 of Custer County into a 640-acre drilling and spacing unit. The unit included the Douglas, Tonkawa, Cottage Grove, Cleveland, Big Lime-Oswego, Cherokee, Atoka, Morrow, Springer, and Chester separate and common sources of supply.

6. On January 5, 1982, the plaintiff Woods Petroleum Corporation commenced the drilling of a well located on non-Indian lands within Section 17 of Custer County. Subsequently, Woods prepared a communitization agreement pooling the Indian mineral interests in Section 17. Under the proposed agreement, operations conducted anywhere within Section 17 were deemed to occur on each lease within the unit. In light of Woods' commencement of drilling on non-Indian lands within Section 17 and the commence clauses in the 1977 leases, the proposed communitization agreement, if put into effect, would operate to extend the terms of the 1977 leases. The agreement stated that

it would be deemed effective as of January 2, 1982.

7. After obtaining the ratification of the majority of the working interest owners in Section 17, Woods submitted the communitization agreement to the Minerals Management Service of the Department of the Interior. On February 17, 1982, the Minerals Management Service recommended that the agreement be approved as a proper geological and economic unit.

8. On February 22, 1982, the communitization agreement was transmitted to the Area Director of the BIA's Anadarko office for his review and approval. On the same day, several of the Indian defendants, owners of mineral interests on the property covered by the 1977 leases, delivered to the BIA's office identical objections to the communitization agreement. These Indian defendants maintained that it would be in their best interest for the communitization agreement not to be

approved, such that the 1977 leases would expire and the defendants would be able to obtain new, more lucrative leases. On April 12, 1982, the Acting Area Director of the Anadarko Office of the BIA approved the communitization agreement submitted by Woods. On September 10, 1982, Woods completed the first productive well on Sections 17, the Meachum No. 17-1 Well, located on non-Indian lands.

9. On June 22, 1983 an attorney representing the Indian mineral interest owners filed with the Area Director of the Anadarko Office of the BIA a notice of the Indians' intention to appeal the approval of the communitization agreement. On August 17, 1983, the Acting Area Director notified the Indian defendants' attorney that an administrative appeal of the approval of the agreement would be considered timely if filed within thirty days. On September 6, 1983, the Indian mineral interest owners filed their

administrative appeal; they provided notice of the appeal to Woods.

10. By letter of September 15, 1983, Woods notified all parties claiming a leasehold interest in the Section 17 unit of the administrative appeal, including Raytex, Mid-Mid-Con, and Mustang. By letter of September 20, 1983, Woods requested that the parties claiming leasehold interests agree to accept Woods' attorney as their legal representative during the appeal. Raytex, Mid-Con, and Mustang agreed to this request. However, they were not joined as parties to the administrative appeal.

11. After a response brief was filed by Woods, the matter was taken under advisement by the Department of the Interior. During the pendency of the administrative appeal, the Concho Agency of the BIA escrowed royalty payments received from Woods.

12. On May 15, 1986, the Assistant Secretary reversed the Acting Area Director's

decision to approve the communitization agreement. The Assistant Secretary set forth a number of reasons for his decision.

13. The Assistant Secretary first found that, in spite of the passing of some sixteen months between the Area Director's approval of the communitization agreement and the commencement of the Indian mineral interest owners' appeal, the appeal was timely. He reasoned that since the Indian lessors were never provided with the written notice of the approval, as required by 25 C.F.R. § 2.4, their compliance with the deadlines set forth in the Area Director's August 17, 1983 ruling rendered their appeal timely.

14. The Assistant Secretary further found that, in light of the Indians' representation that there was a potential lessee willing to lease their mineral interests and to pay them over $400,000.00 in bonus money, and in light of the fact that the Indian lessors would also receive royalties from these new leases, the

Acting Area Director's approval of the communitization agreement was not in the best economic interest of the Indian lessors. Accordingly, the Assistant Secretary reversed the Acting Area Director's April 12, 1982 approval of the communitization agreement.

15. The Assistant Secretary also directed the Area Director of the Anadarko Office of the BIA to move expeditiously in approving new leases of the subject mineral interests. He waived the competitive bidding requirements of 25 C.F.R. § 212.4 and directed that the Indian mineral owners be allowed to negotiate their own leases, subject to the final approval of the Secretary of the Interior or his representative.

16. Subsequently, the defendant Tomlinson Properties, Inc. acquired mineral leases covering the three tracts in Section 17, as described above. These leases were approved by the Superintendent of the Concho Agency of the BIA on May 23, 1986. Tomlinson then

submitted a new communitization agreement governing the subject mineral leases. The BIA approved this new agreement on September 22, 1986.

17. On July 28, 1986 the plaintiffs filed their complaint with this Court. They also filed an Application to Deposit Funds in the Court Registry. That application was granted on July 30, 1986. The plaintiffs have been depositing certain royalty payments arising from wells in Section 17 since that time.

Conclusions of Law

1. This Court has appellate jurisdiction over the parties and subject matter involved in this action pursuant to 5 U.S.C. § 701, § 704, and § 706.

2. The appellants Raytex, Mid-Con, and Mustang received actual notice of the pendency of the administrative appeal. This notice was sufficient to satisfy the requirements of the Due Process Clause. In addition, since it was Woods that submitted the communitization

agreement at issue, neither the Due Process Clause or Department of the Interior regulations required Raytex, Mid-Con, or Mustang to be joined as parties to the administrative appeal.

3. The Secretary of the Interior and his delegates act as trustees of Indian lands and are responsible for the administration and supervision of oil and gas leases thereon. 25 U.S.C.A. § 396; Kenai Oil and Gas, Inc. v. Department of the Interior, 671 F.2d 383, 386 (10th Cir. 1982); Samedan Oil Corp. v. Cotton Petroleum Corp., 466 F.Supp. 521, 525 (D.C. Okla. 1978). Included within this authority is the discretion to approve or disapprove communitization agreements affecting allotted Indian lands such as those in the case at bar. 25 C.F.R. § 212.24; Samedan, 466 F.Supp at 525. A communitization agreement covering oil and gas leases on allotted Indian lands is not effective as to those leases until it is

approved by the Secretary or one of his delegates. Samedan, 466 F.Supp at 526.

4. In reviewing the decision of the Secretary of the Interior or one of his delegates, the Court must determine if the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); Kenai Oil & Gas, Inc. v. Dept. of the Interior, 671 F.2d 383, 386 (10th Cir. 1982); Cheyenne-Arapaho Tribe v. Department of Interior, et al., Case No. CIV-84-1765-A, (W.D. Okla. Nov. 13, 1986). The Secretary is required to articulate the grounds for his decision and the essential facts on which it is based. Dunlop v. Bachowski, 421 U.S. 560 (1975). However, if the record indicates that the Secretary considered all of the relevant factors and made no clear error in judgment, his decision should be affirmed. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416-417 (1971); Kenai, 671 P.2d at 386.

5. Although 25 U.S.C. § 396 and 25 C.F.R. § 212.24 do not set forth specific standards governing the Secretary's decision whether to approve or disapprove a communitization agreement covering Indian lands, the Secretary's decision is limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands. Kenai, at 386. Acting in his capacity as a trustee, the Secretary and his delegates must manage Indian lands so as to make them profitable for the Indians. Id. at 386. The Secretary has a duty to maximize the Indians' lease revenues. Id. at 386; Gray v. Johnson, 395 F.2d 533, 536, (10th Cir.) cert. denied 392 U.S. 906 (1968). Thus, the impact of a particular communitization agreement on the economic interest of Indian mineral owners is one of the relevant factors that the Secretary and its delegates must consider when deciding whether or not to approve the agreement.

Kenai, 671 F.2d at 387; Cheyenne-Arapaho, at page 15.

6. In the instant case, the Assistant Secretary's decision to disapprove the communitization agreement for the Indian lands on Section 17 was based on the representations of the Indian mineral interest owners that, if the communitization agreement was disapproved, they would be able to obtain additional bonus monies by negotiating new leases. The Assistant Secretary was obligated to take such economic considerations into account, and it was within his discretion to base his decision on these economic factors. Kenai, 671 F.2d at 387. In addition, the Assistant Secretary's opinion clearly sets forth the grounds for his decision and the essential facts on which it is based; it evinces no clear error in judgment.

7. The Court further finds that the Assistant Secretary's decision does not render the 1977 leases illusory, as the plaintiff

Woods has argued. Although the Secretary's decision resulted in the termination of the leases in February 1982, at the end of their primary terms, the lessees were free to seek communitization, to drill, and to make any case before the Oklahoma Corporation Commission that might have been worth pursuing during these primary terms. The 1977 leases did not entitle the lessees to pursue these activities beyond the primary terms.

8. The Indian lessors had no implied obligation to cooperate with the lessees by consenting to the proposed communitization agreement. Within legal confines, the Indians were free to pursue their economic interests. The Indians' opposition to the communitization agreement was within legal confines and was entirely consistent with the lease language itself.

9. Accordingly, the Assistant Secretary's decision to disapprove the communitization agreement for Indian lands on Section

17 is affirmed. The Court finds that the 1977 leases expired at the end of their primary terms in February 1982.

Remaining Issues

The proper distribution of the funds that the plaintiffs have deposited into this Court and of the funds held in escrow by the Interior Department remains to be determined. The plaintiffs have argued that, if the Court affirms the Assistant Secretary's decision, as it has done, they should nevertheless be entitled to that portion of the deposited funds sufficient to compensate them for the costs of developing the wells on Section 17. The Indian defendants, the defendant Tomlinson, and the federal defendants contest this assertion: they maintain that the Indian lessees are entitled to all royalties from the wells in Section 17 from the date of first production and that the defendant Tomlinson is entitled to all working interest revenues from

that same date. The defendants assert that Woods is not entitled to recover well costs.

Although these issues were briefed to a limited extent in the parties' summary judgment briefs, the Court finds that further briefing may be edifying. Accordingly, the parties will be permitted to file within forty-five days of this Order, briefs concerning the proper position of the funds deposited in the Court's registry and within the Interior Department. In particular, the parties should address the issues of Woods' entitlement to recover well costs and the entitlement of the Indian defendants and the defendant Tomlinson to royalties and working interest revenues, respectively, from the wells in Section 17. These briefs should not exceed thirty pages in length.

It is so ORDERED this 19th day of February, 1988.

/s/ Wayne Alley
WAYNE E. ALLEY
United States District Judge

FILED
JAN 24 92
Robert D. Dennis
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA
BY DEPUTY_____

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

WOODS PETROLEUM
CORPORATION, et al.,

Plaintiffs,

v. Case No. CIV-86-1623-A

UNITED STATES DEPARTMENT
OF THE INTERIOR, et al.,

Defendants.

JUDGMENT ON PLAINTIFFS' CLAIMS

NOW on this date the Court has directed entry of final judgment resolving fewer than all claims for relief upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment in the form of this Judgment on Plaintiffs' Claims in accordance with Rule 54(b), Fed. R. Civ. P.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

As to plaintiffs' first claim for relief, judgment should be and hereby is entered against the plaintiffs and in favor of the defendants, adjudging the administrative order of the Assistant Secretary for Indian Affairs for the Department of the Interior, dated May 15, 1986, to be valid and enforceable, based upon the findings, conclusions and rationale stated in this Court's orders entered February 22, 1988, September 29, 1988, December 22, 1988, May 24, 1989, February 21, 1991 and November 4, 1991 (collectively the "Court's Orders").

As to plaintiffs' second claim for relief, judgment should be and hereby is entered against the plaintiffs and in favor of the defendants, based upon the findings, conclusions and rationale stated in the Court's Orders, decreeing the title of defendant Tomlinson Properties, Inc., in and to certain oil and gas leasehold estates to be superior to the title of plaintiffs, consisting of an undivided one-half oil and gas

leasehold interest in the following described tracts, to-wit:

East Half of the East Half of the Southwest Quarter, and the East Half of the East Half of the West Half of the East Half of the Southwest Quarter, in Section 17, Township 12 North, Range 17 West, Custer County, Oklahoma (previously conveyed to National Cooperative Refinery Association in Indian Lease No. 14-20-205-7048, now expired); and

Northwest Quarter of the Southwest Quarter, and the East Half of the East Half of the Southwest Quarter of the Southwest Quarter, and the West Half of the West Half of the West Half of the East Half of the Southwest Quarter, and the West Half of the East Half of the West Half of the West Half of the East Half of the Southwest

Quarter, in Section 17, Township 12 North, Range 17 West, Custer County, Oklahoma (previously conveyed to National Cooperative Refinery Association in Indian Lease No. 14-20-205-7049, now expired); and

West Half of the East Half of the Northwest Quarter, and the West Half of the Northwest Quarter, in Section 17, Township 12 North, Range 17 West, Custer County, Oklahoma (previously conveyed to National Cooperative Refinery Association in Indian Lease No. 14-20-205-7050, now expired).

As to plaintiffs' third claim for relief, judgment should be and hereby is entered against the plaintiffs and in favor of the defendants, based upon the findings, conclusions and rationale stated in the Court's Orders. The United States Department of the Interior is hereby ordered to pay over to the

Indian Defendants and to Tomlinson Properties, Inc., all amounts now held in escrow by said Department on account of royalty remittances paid under the expired leases described above, and these payments shall be of all principal and interest now held in said escrow account, and these payments shall be made to the parties shown in Schedule A hereto, which is incorporated herein by reference, in the exact proportion shown as the interest of the parties depicted on said Schedule A.

The Clerk of the Court is further ordered to pay over to the Indian Defendants and to Tomlinson Properties, Inc., all amounts now held in the registry of the Court on account of funds tendered by plaintiffs under the authority of this Court's order dated July 30, 1986, and these payments shall be of all principal and interest now held in said account, and these payments shall be made to the parties shown in Schedule A hereto, which is incorporated herein by reference, in the exact

proportion shown as the interest of the parties depicted on said Schedule A.

As to counterclaim for accounting filed herein by the Indian Defendants, no judgment is entered at this time. This Judgment on Plaintiffs' Claims is nevertheless final for purposes of appeal.

/s/ Wayne Alley
UNITED STATES DISTRICT JUDGE

ENTERED ON JUDGMENT DOCKET ON
JAN 24 1992

S C H E D U L E "A"

	OWNER	OWNERSHIP INTEREST
1.	McClain H. Twins, Jr.	0.007888976
2.	Michael T. Nibs	0.018159030
3.	Lowell D. Nibs	0.018159030
4.	Leroy Stoneroad	0.037056738
5.	Solomon Stoneroad	0.037056738
6.	Victor Stoneroad	0.037056738
7.	Eleanor Stoneroad	0.025531914
8.	Miriam Twins	0.071000788
9.	Anna Spottedwolf	0.213002364
10.	Wilma R. Nibs	0.022698788
11.	Timothy G. Nibs	0.024802552
12.	Ronald L. Nibs	0.077175878
13.	Elaine N. Cowart	0.077175880
14.	Theodore R. Nibs	0.077175878
15.	Lucian M. Twins	0.023666930
16.	Joyce M. Twins	0.023666930
17.	Minita Runningwater	0.023666930
18.	Wesley R. Twins	0.023666930
19.	Lucinda Sweetwater	0.023666930
20.	Marion M. Twins	0.007888976

21.	Michael W. Twins	0.007888976
22.	DeAnn Nibs	0.018159030
23.	Brenda K. Nibs	0.022698788
24.	Joe N. Hicks	0.000000000
25.	Tomlinson Properties, Inc.	0.081088288[1]
	TOTAL	1.000000000

09\WOODS.LSR

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[1]The interest owned by Tomlinson Properties, Inc. was acquired by Tomlinson from Eleanor Stoneroad, Timothy Gordon Nibs and Joe N. Hicks after such Indian owners obtained a fee patent from the United States Government covering their interests. Therefore, the United States Government does not warrant title to Tomlinson with respect to the minerals that were conveyed to Tomlinson by Eleanor Stoneroad, Timothy G. Nibs and Joe N. Hicks.

FILED
United States Court of Appeals
Tenth Circuit
FEB 09 1995
PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WOODS PETROLEUM CORPORATION; RAYTEX RESOURCES INCORPORATED; MIDCON CENTRAL EXPLORATION COMPANY; MUSTANG PRODUCTION COMPANY,

Plaintiffs-Appellants,

v. No. 92-6053

DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; TIMOTHY NIBS; WISDOM A. NIBS, JR.; REGINALD R. NIBS; RONALD LEROY NIBS; ELAINE SHIRLEY NIBS MAYES; D'ANN NIBS; LOWELL NIBS; THEODORE RAYMOND NIBS; WISDOM NIBS, SR.; BRENDA TONIPS NIBS; MICHAEL NIBS; LEROY STONEROAD; VICTOR STONEROAD; SOLOMON STONEROAD; ELEANOR JOY STONEROAD; JOE HICKS; ANNA B. TWINS SPOTTEDWOLF; PATRICK B. SPOTTEDWOLF; LUCIAN M. TWINS; JOYCE M. TWINS; MINITA TWINS RUNNINGWATER; WESLEY ROBERT TWINS; LUCINDA AMELIA SWEETWATER; MARIAM MANN TWINS; MCCLAIN H. TWINS, JR.; MARION

M. TWINS; MICHAEL WAYNE TWINS;
TOMLINSON PROPERTIES, INC.,

Defendants-Appellees.

ON REHEARING EN BANC

Donald L. Kahl of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Tulsa, Oklahoma (Orval E. Jones, with him on the brief), for Plaintiffs-Appellants.

David C. Shilton, United States Department of Justice, Washington, D.C. (Lois J. Schiffer and Roger Clegg Acting Assistant Attorneys General, Gerald S. Fish, Dirk Snel and Robert L. Klarquist, United States Department of Justice, and Timothy D. Leonard, United States Attorney and M. Kent Anderson, Assistant United States Attorney, Oklahoma City, Oklahoma, with him on the brief), for Defendants-Appellees United States Department of the Interior and Bureau of Indian Affairs.

Steven L. Barghols and Jay C. Jimerson of Mock, Schwabe, Waldo, Elder, Reeves & Bryant, Oklahoma City, Oklahoma, on the brief, for Defendant-Appellee Tomlinson Properties, Inc.

Amos E. Black, III of Black & Zynda, Anadarko, Oklahoma, on the brief, for Defendants-Appellees Anna Twins Spottedwolf, Eleanor Stoneroad, Victor Stoneroad, and Leroy Stoneroad.

Before **SEYMOUR**, Chief Judge, **LOGAN**, **MOORE**, **ANDERSON**, **TACHA**, **BALDOCK**, **BRORBY**, **EBEL**, **KELLY**, and **HENRY**, Circuit Judges.

EBEL, Circuit Judge.

We granted the request for rehearing en banc in this case to clarify the Secretary of the Interior's authority under 25 U.S.C. § 396 to disapprove a proposed oil and gas communitization agreement that include Indian-owned

mineral interests. Woods Petroleum Corporation and other oil companies ("Woods Petroleum") commenced this action to challenge the Secretary's order rejecting a proposed agreement to communitize Indian and non-Indian mineral interests for oil and gas production in the Anadarko region of Oklahoma. The district court upheld the Secretary's order. A panel of this court reversed and remanded with instructions to reverse the Secretary's order and to approve the proposed communitization agreement. Woods Petroleum Corp. v. United States Dep't of Interior, 18 F.3d 854 (10th Cir. 1994). The United States Department of the Interior, Tomlinson Properties, Inc., and certain of the Indian lessors petitioned for rehearing en banc on the grounds that our panel decision clashed with earlier Tenth Circuit authority.

Today, we make explicit that the Secretary acts arbitrarily and abuses his discretion under § 396d when he (1) rejects a

proposed communitization agreement for the sole purpose of causing the expiration of a valid Indian mineral lease and allowing the Indian lessors to enter into a new, more lucrative, lease, and then (2) approves essentially the identical communization agreement, with the new lessee of the Indian lands simply substituted for the old lessee, and permits the Indian lessors to collect royalties retroactively to the date of first production under the original unit plan. Accordingly, we adhere to our panel decision's reversal of the district court order and we remand with instructions to approve the Woods Petroleum communitization agreement.

I. Background

Our panel opinion provides a full recitation of the factual background to this action, Woods Petroleum, 18 F.3d at 855-57, but we review the critical events and rulings to frame our analysis. In February 1977, the Indians named in this action leased their

undivided interest in 117.5 net mineral acres in Custer County, Oklahoma to National Cooperative Refinery Association ("National"). The three leases granted National an exclusive right to drill for and extract all oil and gas underlying the land for a primary term of five years and "as much longer thereafter as oil and/or gas is produced in paying quantities."[1] The Concho Agency Superintendent of the Bureau

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[1]The leases contain a "commence drilling" clause and a "consent to unitization" clause. The "commence drilling" clause provides that:

> If the lessee shall commence to drill a well within the term of this lease, the lessee shall have the right to drill such well to completion with reasonable diligence and if oil or gas, or either of them, be found in paying quantities, this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned.

The "consent to unitization" clause states that:

> The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior ...

of Indian Affairs ("BIA"), an agency in the United States Department of Interior ("Interior"), approved the leases. Next, the BIA approved National's assignment of its interest in the leases to Woods Petroleum.

On May 18, 1979, the Oklahoma Corporation Commission ("Commission") established a 640-acre drilling and spacing unit that included this Indian land.[2] On December 1, 1981, all working interest owners in the unit area executed a communitization agreement, naming Woods Petroleum as the unit operator ("Woods Petroleum communitization agreement"). Communitization permits the development of several contiguous leaseholds as a single

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[2]The Oklahoma Corporation Commission is authorized "to establish well spacing and drilling units of specified and approximately uniform size and shape covering any common source of supply ... of oil or gas within the State of Oklahoma." Okla. Stat. Ann. tit. 52, § 87.1(a) (West 1991). "The purpose, and usual effect, of pooling [i.e. designating spacing units] is to prevent the physical and economic waste that accompanies the drilling of unnecessary wells." Howard R. Williams and Charles J. Meyers, Oil and Gas Law, Vol. 6, § 901 at 3 (1993).

unit, so that "operations conducted anywhere within the unit area are deemed to occur on each lease within the communitized area and production anywhere within the unit is deemed to be produced from each tract within the unit." Kenai Oil & Gas, Inc. v. Dep't of the Interior, 671 F.2d 383, 384 (10th Cir. 1982).

Pursuant to the communitization agreement -- and six weeks prior to the expiration date of the leases -- Woods Petroleum commenced drilling the authorized well on a non-Indian tract within the unit on January 5, 1982. On February 17, 1982, also prior to the expiration of the Indian leases, Woods Petroleum submitted the communitization agreement to Interior for its approval. An approved communitization agreement, in conjunction with the "commence drilling" clause, would extend Woods Petroleum's leases beyond the primary term for as long as there is production in paying quantities.

On April 12, 1982, the Anadarko Area Director of the BIA approved the proposed Woods Petroleum communitization agreement over the Indian lessors' objections. The Indian lessors had unsuccessfully argued that communitization was not in their economic best interest because the Secretary's disapproval of the agreement would trigger the expiration of the Indians' existing leases and facilitate the execution of more profitable leases.

On September 6, 1983, the Indians filed an administrative appeal to the Assistant Secretary of Interior.[3] Notably, the Indians did not object to any particular provision in the communitization agreement. Instead, they simply argued that their mineral interests could easily be released "on a competitive bid basis and with a stroke of a pen a Communitization Agreement can be signed by the Area

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[3]During the pendency of this appeal, Interior escrowed the unit royalties attributable to the Indian tracts under the state-ordered spacing unit.

Director joining a validly leased Indian Allotments to the spacing Unit."

To evaluate the Indians' appeal, the Deputy Assistant Secretary requested the BIA Area Director to prepare a "best interest assessment." The BIA's "best interest assessment" advised the Assistant Secretary to affirm the Area Director's approval of the Woods Petroleum communitization agreement for many reasons. First, the BIA opined that prevailing market conditions could stifle the separate development of the Indian interests under new leases and that the Oklahoma Corporation Commission may not approve independent production, transportation and sale of product.[4] Second, the BIA noted that the Indians would forfeit nearly $400,000 in unit

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[4]The BIA explained that three wells had been drilled in the spacing unit, all on non-Indian tracts, but only one well was profitable. The profitable well was farthest away from the Indian tracts, whereas the two unprofitable wells were adjacent to the Indian tracts. Based on these production results, the BIA could give no assurance that a profitable well could be located on the Indian tracts.

royalties currently held in escrow under the state-approved spacing unit in which production had already occurred. And finally, the BIA presciently anticipated that rejection of the communitization agreement could invite protracted litigation.

After receiving the BIA's recommendation, the Assistant Secretary solicited comments from both the Indians and Woods Petroleum. Again, the Indians expressed their desire to be able to release their mineral interests for a bonus exceeding $400,000 and then to "be immediately joined with the 640 acre spacing by a Communitization Agreement." Notwithstanding the BIA's recommendation, the Assistant Secretary reversed the BIA Area Director's approval of the Woods Petroleum communitization agreement on May 15, 1986. The Assistant Secretary did not challenge the appropriateness of the communitization agreement as establishing a proper geological and economic unit. Instead, the Assistant

Secretary focused on the underlying Indian leases and concluded that it would be in the Indians' best interest to allow the Woods Petroleum leases to expire so that the Indians could enter into new leases with Defendant-Appellee Tomlinson Properties, Inc. ("Tomlinson"), who was willing to pay the Indians a $400,000 bonus. The Assistant Secretary did not address the BIA's specific rationales in support of communitization and thus did not analyze the factors enumerated in the BIA guidelines. Relying exclusively on Tomlinson's bonus offer, the Assistant Secretary disapproved the Woods Petroleum communitization agreement and issued an order declaring that the Woods Petroleum leases had expired for failure to drill, produce, or communitize during the primary term.

On the heels of the Assistant Secretary's order, the Indians promptly released their interest in the 117.5 net mineral acre estate to Tomlinson for a $400,000 bonus. The BIA

Area Director approved the new leases on May 23, 1986. Pursuant to the Area Director's approval, the Indian interests were reinserted in the 640-acre state spacing unit. Tomlinson next drafted a communitization agreement that was, in all material respects, identical to the Woods Petroleum communitization agreement ("Tomlinson communitization agreement"). Not only did the Tomlinson communitization agreement apply to the same spacing unit, but it was postdated to take effect as of September 1, 1982 -- thereby enabling the Indian lessors to obtain unit revenues retroactive to the time of first production four years earlier from the first unit well drilled on the spacing unit covered by the Woods Petroleum communitization agreement. On September 22, 1986, the Assistant Secretary approved the new Tomlinson communitization agreement.

On July 28, 1986, Woods Petroleum commenced this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq.,

in the United States District Court for the Western District of Oklahoma, against Interior, the BIA, the Indian lessors, and Tomlinson. Woods Petroleum alleged that the Assistant Secretary's rejection of the Woods Petroleum communitization agreement was arbitrary and capricious and thus should be vacated. Additionally, Woods Petroleum sought an order declaring its 1977 leases superior to the Tomlinson leases. In the alternative, Woods Petroleum argued that if the court upholds the Tomlinson communitization agreement, Woods Petroleum was entitled to a refund of all proceeds of unit production paid to the Indians under the 1977 leases.

The district court upheld the Assistant Secretary's order rejecting the Woods' communitization agreement as a valid exercise .of discretion, and subsequently ruled that the Indian mineral interests would be treated as part of the unit from the date of first

production, and thus the Indians were entitled to unit royalties back to 1982.

Woods Petroleum timely filed its appeal and we reversed and remanded with instructions to reinstate the BIA's order approving the Woods Petroleum communitization agreement and to declare void the Tomlinson lease and the Tomlinson communitization agreement. Woods Petroleum, 18 F.3d at 860. The panel concluded that "the sole reason behind the Secretary's rejection of the [Woods Petroleum] communitization agreement was to provide a pretext for the ulterior motive of enabling the Indian lessors to acquire an additional bonus payment from a new potential contracting party." Id. at 859. "[T]o reject a communitization agreement for that purpose, and then to accept essentially an identical communitization agreement, particularly while permitting retroactive benefits to inure to the Indian lessors, constitutes arbitrary and capricious conduct and cannot stand." Id. at

859-60. Our analysis followed quite closely the law previously established in Cotton Petroleum Corp. v. United States Dep't of Interior, 870 F.2d 1515 (10th Cir. 1989).

On April 21, 1994, the government filed a petition for rehearing with suggestion for en banc consideration, arguing that Woods Petroleum and Cotton Petroleum are inconsistent, at least in philosophy, with Kenai, 671 F.2d at 386-88, and Cheyenne-Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583 (10th Cir. 1992), cert. denied, 113 S. Ct. 1642 (1993), and 113 S. Ct. 1643 (1993). The government's petition stated that the alleged disparities in these opinions cast a cloud of uncertainty over the factors that Interior may consider in approving or rejecting future communitization agreements involving Indian lessors.

We granted the petition for en banc consideration to clarify the Secretary's authority to approve and reject communitization

agreements. In so doing, we adhere to the legal principles articulated in our panel decision, Cotton Petroleum, Kenai, and Cheyenne-Arapaho.

II. Discussion

Under the Administrative Procedure Act, we may set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); Cotton Petroleum, 870 F.2d at 1525. An agency decision may be arbitrary and capricious if it fails to consider important relevant factors. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 42-43 (1983); Cotton Petroleum, 870 F.2d at 1525-26. Alternatively, the decision is arbitrary and capricious if there is no "rational connection between the facts found and the choice made." Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974).

Congress has empowered the Secretary of the Interior with an important supervisory role over oil and gas communitization agreements involving Indian mineral interests. See Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a et seq. Pursuant to 25 U.S.C. § 396d, the Secretary has the discretion to approve or prescribe a "reasonable cooperative unit."

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan

approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development of oil or gas from land covered by such lease.

Id.; see also 25 C.F.R. §§ 211.21(b) (governing tribal lands) & 212.24(c) (governing allotted lands).[5] Thus, inclusion of Indian mineral interests in a cooperative plan, including a state-ordered spacing unit, requires the Secretary's approval.

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[5] Section 211.21(b) provides:

> All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.

Section 212.24(c) provides:

> All leases issued pursuant to the regulations in this part shall be subject to a cooperative or unit development plan affecting the leased lands if and when required by the Secretary of the Interior.

To guide the Secretary's evaluation of a proposed communitization agreement involving Indian mineral interests, the BIA promulgated guidelines in 1982 that identify three critical factors: (1) whether the long term economic effects of the proposed agreement are in the Indian lessor's best interest; (2) whether the engineering and technical aspects of the agreement adequately protect the Indian lessors; and (3) whether the lessee has complied with the terms of the lease in all respects prior to its expiration date. Cotton Petroleum, 870 F.2d at 1518 (quoting the BIA Guidelines). The first two of these factors require the Secretary to focus on the communitization agreement, and the third factor simply asks if the lessee is in default under the existing lease.

In evaluating the Secretary's actions, we must keep in mind that the Secretary and his delegates act as the Indians' fiduciary and thus must represent the Indians' best

interests. Cheyenne-Arapaho, 966 F.2d at 588-89; Cotton Petroleum, 870 F-2d at 1524; Kenai, 671 F.2d at 386. The power to manage and regulate Indian mineral interests carries with it the duty to act as a trustee for the benefit of the Indian landowners. Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1563-65 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), reh'g en banc, 782 F.2d 855 (10th Cir.) (adopting dissenting opinion), modified, 793 F.2d 1171, 479 U.S. 970 (1986). Yet, as with any trustee-beneficiary relationship, the Secretary's fiduciary duty to the Indians under § 396d is not boundless and cannot be exercised in a manner that exceeds or flouts the authorizing statute and regulations. When the Secretary deviates from firmly established procedures, or exceeds the limits of his fiduciary duty, we have found an abuse of discretion and have reversed the Secretary.

For example, we have consistently admonished the Secretary to analyze all relevant factors and have reversed rulings that either disregarded certain factors or treated one factor as determinative. In Kenai, the lessee alleged that the Secretary's rejection of a communitization agreement constituted an abuse of discretion because the Secretary refused to confine his analysis to production and conservation matters. Kenai, 671 F.2d at 387. We eschewed the lessee's restrictive approach and upheld the Secretary's ruling because he properly considered "all relevant factors," including the Indian lessors' economic best interests. Id. at 386-87. Likewise, in Cotton Petroleum, we reversed the Secretary's rejection of a communitization agreement, in part, because "the Secretary failed to discuss or analyze all of the relevant factors required in reaching his decision, mandated under his guidelines." Cotton Petroleum, 870 F.2d at

1525-26. And more recently in Cheyenne-Arapaho, we held that the Secretary abused his discretion by approving a communitization agreement without first considering relevant economic factors. Cheyenne-Arapaho, 966 F.2d at 589-91.[6]

As the Secretary's clearly articulated factors in the BIA guidelines make clear, the issue before the Secretary is whether the communitization agreement should be approved, and it is not whether the underlying leases, which previously had been approved by the Secretary, were a good deal or bad deal with the benefit of hindsight. When the Secretary first disapproved the communitization agreement for the sole purpose of causing the underlying leases to terminate, and then immediately thereafter approved an identical communitization agreement for the new leases,

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[6]Moreover, the Secretary's mere perfunctory recitation of one or more relevant factors does not constitute adequate consideration. Cotton Petroleum, 870 F.2d at 1525-26.

it is obvious that the Secretary was not really evaluating the communitization agreement at all. Rather, he was using his power in an arbitrary way to disapprove the communitization agreement as a mere vehicle to cause the underlying leases to terminate.

In Cotton Petroleum, the record demonstrated that the Secretary did not reject the proposed communitization agreement because the proposed unitization agreement was detrimental to the Indian lessors. Rather, the sole reason behind the Secretary's disapproval was to facilitate the expiration of the original lease and thus to permit the Indian lessors to acquire a new bonus payment from a new lessee, who eagerly offered an additional premium because drilling had already commenced in the spacing unit. Cotton Petroleum, 870 F.2d at 1527. With the Indian's more lucrative lease in hand, the Secretary turned around and approved the identical communitization agreement, ordered inclusion of the Indian tract in

the same spacing unit, and awarded retroactive benefits under the original agreement. Id. We reversed because "[i]nstead of evaluating the communitization agreement on its merits, the Secretary used its rejection as a triggering event to cause the termination of a separate instrument, the lease." Id. at 1528.[7]

We found no such duplicitous evaluation of a communitization plan in Kenai. In Kenai, the Secretary simply concluded that communitization was economically unsatisfactory for the Indians given the likelihood of increased revenues under a new lease. There, productive wells had been drilled directly on the Indian

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[7] In essence, the Secretary's actions in Cotton Petroleum permitted the Indians to take a fresh look at the value of their mineral interests while neither incurring additional expense nor heightened risk.

That the Secretary awarded retroactive benefits under the communitization agreement provided further evidence of the fairness of the original agreement and the inconsistency -- and hence arbitrariness -- of the Secretary's action. Cotton Petroleum, 870 F.2d at 1527.

land and there was no suggestion that the new lease would be pooled with neighboring tracts. Kenai, 671 F.2d at 387. In contrast to the actions of the Secretary in the instant case and in Cotton Petroleum, the Secretary in Kenai did not take inconsistent and arbitrary positions with regard to communitization.[8]

Similarly, there is nothing in our opinion in Cheyenne-Arapaho suggesting that the Secretary could take inconsistent positions on a communitization agreement merely to allow Indians the opportunity to release their land on more attractive terms.

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[8]Our opinion in Cotton Petroleum underscored this crucial distinction to Kenai:

> [In Kenai], the Secretary ... was not taking inconsistent positions as to whether the Indian lessor was in or out of the communitization unit. Rather, the Secretary in Kenai refused to approve the communitization agreement for any purpose. We were not faced there with a situation where the Secretary was seeking simultaneously to free the Indian lessor from the burdens of the communitization agreement while retaining for the Indians its benefits.

Cotton Petroleum, 870 F.2d at 1528 n.4.

To the contrary, we simply held there that the Secretary breached his fiduciary duty to the Indians by approving communitization without considering the economic impact to Indian mineral interest owners if their tracts were de-spaced. Cheyenne-Arapaho, 966 F.2d at 590-91. Communitization in Cheyenne-Arapaho involved only Indian land, and wells had already been drilled on several of the Indian leases. The issue was only whether the Secretary should have considered the economic consequences of new leases as contrasted to the communitized development of the Indian land, and we held that the Secretary should have considered all factors.

Thus, Kenai, Cotton Petroleum, and Cheyenne-Arapaho define certain boundaries for the Secretary's supervisory authority under 25 U.S.C. § 396d and his fiduciary duty to Indian mineral interests. As a threshold matter, we have consistently adhered to the principle that the Secretary must analyze all relevant

factors articulated in the 1982 BIA guidelines in judging the propriety of a proposed communitization agreement. Further, the Secretary's task under § 396d is to provide a bona-fide evaluation of the communitization plan, not to use that evaluation as a mere vehicle to achieve an ulterior objective otherwise unattainable. Cf. United Nuclear Corp. v. United States, 912 F.2d 1432, 1438 (Fed. Cir. 1990) (holding that the Secretary's refusal to approve a mining plan submitted by a mining company that had been awarded leases on Indian reservation constituted a taking under the Fifth Amendment, rather than a proper exercise of fiduciary duty, because, in part, the Secretary's action was "an attempt to enable the Tribe to exact additional money from a company with whom it had a valid contract"). This is not to say that the Secretary may not reject a communitization agreement either because an analysis of all relevant factors fairly leads to the conclusion that the

particular agreement is not advantageous to the Indians, or because the Secretary determines that it is in the Indian lessor's best interests to forego communitization altogether. However, it is to say that the process of evaluating a communitization agreement is not a sham process but rather must be exercised in good faith, and the Secretary may not act arbitrarily and inconsistently in exercising his approval powers.

The Secretary acknowledges that the sole purpose behind his disapproval of the Woods Petroleum communitization agreement was to enable the Indian lessors to enter into more profitable leases with Tomlinson. Sweeping aside the BIA guideline factors, which his delegate had concluded pointed strongly in favor of approving the Woods Petroleum agreement, the Secretary mimicked the wrongful actions in Cotton Petroleum by: (1) rejecting one communitization agreement for the sole

purpose of allowing a valid lease to expire and to be replaced by a more lucrative lease; and then (2) including the Indian mineral interests in the same state-ordered spacing unit under an identical communitization agreement, and awarding retroactive royalties generated by the unit. The Secretary found no factor intrinsic to the Woods Petroleum communitization agreement that merited disapproval. Indeed, the Secretary ignored the relevant communitization factors spelled out in the 1982 BIA guidelines, namely the long-term economic effects of the communitization agreement, the conservation and technical aspects of the agreement, and whether the lessee complied with the lease terms. Cotton Petroleum, 870 F.2d at 1518.

An additional factor that separates Cheyenne-Arapaho and Kenai from the instant case and Cotton Petroleum is that the Indian mineral interests in Cheyenne-Arapaho and Kenai had not been placed in a state-ordered

spacing unit at the time the lessees presented the proposed communitization agreement to the Secretary for his approval. Here, as in Cotton Petroleum, the Oklahoma Corporation Commission had already approved a 640-acre drilling and spacing unit, signifying that the Indian mineral interests were situated within a common source of supply.

Because the Secretary must approve any state-ordered spacing unit that includes Indian mineral interests, 25 C.F.R. § 212.24(c), the Oklahoma Corporation Commission's spacing order does not protect the Indian mineral owners until the Secretary approves the plan. Absent a communitization agreement, Indian owners of tracts adjacent to a producing well may have no right to share in the revenues generated by that well, even if oil and gas has been drained from their property. Thus, both here and in Cotton Petroleum -- where the only producing wells were off Indian land -- the Secretary's

rejection of the communitization agreement risked forfeiture of the Indian mineral owners' right to share unit revenues generated from the producing wells on non-Indian tracts within the unit and jeopardized the independent development of the Indian tracts. The Secretary sought to avert these adverse ramifications in the instant case and in Cotton Petroleum by promptly approving new communitization agreements and awarding the Indian mineral owners royalties retroactive to the date of first production in the unit. In so doing, however, the Secretary merely demonstrated the arbitrariness of his action in disapproving the communitization agreement.[9]

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[9]Further, the Secretary's order in the instant case appears improperly to have penalized Woods Petroleum for waiting "until the eleventh hour to submit a Communitization Agreement for approval." Aplt. App. at 132. The Secretary noted that Woods Petroleum failed to commence drilling on the Indian land during the primary term of the lease, and thus "voluntarily assumed the risk not only that the Department might not act on the Agreement prior to the expiration of the leases, but that the Agreement might be

Having concluded that the Secretary acted arbitrarily and abused his discretion, we next consider the appropriate remedy. Under the APA, a reviewing court must rely on the administrative record to assess the validity of the agency action. Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam). When the agency has failed to explain adequately the rationale underlying its action, and "further explanation is necessary to a proper assessment of

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disapproved." Id. However, the record establishes that Woods Petroleum submitted a fully-executed communitization agreement to the Secretary, and had drilled a well in the state-ordered spacing unit, before the primary terms of the original 1977 leases were due to expire. Indeed, we explained in Cotton Petroleum that submission of a communitization agreement to Interior prior to the expiration of the lease's primary term constitutes timely filing. Cotton Petroleum, 870 F.2d at 1523. Neither 25 U.S.C. § 396d nor the regulations promulgated thereunder specify time restrictions for the Secretary's review of a proposed communitization agreement. It is not unusual in oil and gas production for a lessee to drill the qualifying well, or execute a spacing unit agreement, near the end of the primary term of the lease. For instance, the lessee in Cotton Petroleum commenced drilling in the unit eighteen days prior to the expiration of the lease, whereas drilling commenced fifty-one days prior to the lease expiration date in the instant case.

the agency's decision," the court should ordinarily remand for further proceedings. Id. at 143. As we explained in our panel opinion, "[i]f the only deficiency in the Secretary's actions were an inadequate analysis and discussion of all relevant factors [in the BIA guidelines]," remand would be appropriate in light of Camp. Woods Petroleum, 18 F.3d at 859.

However, remand for further explanation would be fruitless in this case because the Secretary has unequivocally explained his action as intended to facilitate the expiration of the Woods Petroleum lease and the Indian's receipt of a bonus payment from Tomlinson. With respect to the propriety of the Woods Petroleum communitization agreement, neither the Secretary nor the Indian lessors has ever identified any deficiencies, and the Secretary's approval of the identical Tomlinson communitization agreement is tantamount to an approval of the reasonableness of the Woods

Petroleum communitization agreement. In fact, the BIA Area Director's "best interest assessment," properly analyzed through the lens of the 1982 BIA guidelines, recommended approval of the Woods Petroleum communitization agreement. Because this recommendation provides a full recitation of the relevant factors, and no parties object to the substance of the BIA's evaluation of the communitization agreement, we conclude that the BIA Area Director's approval of the Woods Petroleum communitization agreement should be upheld.

III. Conclusion

For the foregoing reasons, we REVERSE the district court's order and REMAND with instructions to reverse the Secretary's order, to reinstate the BIA Area Director's approval of the Woods Petroleum communitization agreement, to declare that the Woods Petroleum leases have not expired, and to declare void both the Tomlinson communitization agreement

and the Tomlinson leases. Finally, we direct the court to conduct an accounting of all funds involved, including bonuses, with distribution and/or return to follow as if the Area Director's approval of the Woods Petroleum communitization agreement had been timely adopted and AFFIRMED.

92-6053 Woods v. Department of Interior

HENRY, Circuit Judge, dissenting, with whom SEYMOUR, Chief Circuit Judge, joins:

Acknowledging the Secretary of the Interior's fiduciary obligations, the majority overturns a decision that resulted in the negotiation of more lucrative leases on behalf of Indian mineral owners. I find the majority's reasoning inconsistent with both the paramount obligation of trust that our government owes to its indigenous peoples and with the great deference that we generally afford to agency decisions. By imposing requirements on the Secretary that we have not required of other agencies, the majority undermines the generally established standard of review for administrative decisions. The majority opinion also does not resolve the conflict in our prior cases regarding the Secretary's evaluation of communitization agreements. Therefore, I must respectfully dissent.

As the majority notes, we may overturn an agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Supreme Court has explained this narrow standard of review as follows:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

In my judgment, in disapproving the Woods communitization agreement, the Assistant Secretary made a reasoned decision to which we should defer. I base this conclusion on an examination of the Secretary's fiduciary obligations to Indian mineral owners, our prior decisions regarding the evaluation of communitization agreements governing tribal and allotted lands, and the record of the Interior Department proceedings, which reflects extensive efforts by the Assistant Secretary to obtain and review relevant facts and law.

A. The Secretary's Fiduciary Obligations

In its dealings with Indian peoples, the federal government "has charged itself with moral obligations of the highest responsibility and trust." Seminole Nation v. United States, 316 U.S. 286, 297 (1942). As a result, the relationship between the Indians and the federal government "is marked by peculiar and cardinal distinctions which exist

nowhere else" and "resembles that of a ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831). See generally Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., dissenting) (discussing Secretary of the Interior's fiduciary obligations to Indian mineral owners), dissenting opinion adopted as majority opinion as modified, 782 F.2d 855 (10th Cir.) (en banc), cert. denied, 479 U.S. 970 (1986); Stephen L. Pevar, The Rights of Indians and Tribes 26-36 (2d ed. 1992).

In addition to this general trust relationship, there are "other, context-specific trust relationships of varying depth and responsibility" that arise in particular areas of federal government regulation involving Indian people. Jicarilla, 728 F.2d at 1563. One scholar has observed that "the more specific the obligation, the higher the duty of care." Pevar, supra, at 28.

In Jicarilla, we examined the federal government's role in the leasing of minerals located on land owned by an Indian tribe. After considering the provisions of the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g, accompanying regulations, and the Act's legislative history, we concluded that Congress intended for the Secretary of the Interior to act as a fiduciary for Indian mineral owners. We found that "[t]he evident purpose of the statute is to ensure that Indian tribes receive the maximum benefit from mineral deposits on their lands through leasing." Jicarilla, 728 F.2d at 1565. We further noted that the regulations enacted pursuant to the Indian Mineral Leasing Act repeatedly stress that the Secretary "must act in the best interests of the tribes." Id. We deemed it significant that the Act was passed because, "'it [was] not believed that the present law [was] adequate to give the Indians the greatest return from their property.'" Id.

(quoting Senate Report No. 985, at 2 (1937); House Report No. 1872, at 2 (1938)).

The fiduciary obligation we outlined in Jicarilla informs courts' assessments of particular statutes and regulations. As a result, whenever doubt or ambiguity exists in the applicable statutory and regulatory provisions, "such doubt is resolved in favor of the tribes." Jicarilla, 728 F.2d at 1563 (citing Bryan v. Itasca County, 426 U.S. 373, 392 (1976)). The Secretary's fiduciary responsibilities also limit the range of regulatory decisions that he or she may make:

> When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one "reasonable" choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe. In short, he cannot

escape his role as trustee by donning the mantle of administrator ...

Id., at 1567 (emphasis added).

These principles of fiduciary responsibility apply to the instant case. Like the statutes and regulations that we analyzed in Jicarilla, the statute that quite specifically governs the leasing of allotted Indian lands, 25 U.S.C. § 396, vests broad discretion in the Secretary of the Interior. Enacted in 1909, the statute authorizes the Secretary to execute mining leases for any term of years that he deems advisable. It states that the Secretary may "perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect." 25 U.S.C. § 396. In addition, the statute expressly grants the Secretary the right to "reject all bids whenever in his judgment the interests of the Indians will be

served by so doing, and to readvertise such lease for sale." Id.

The legislative history of 25 U.S.C. § 396 is instructive. As originally drafted, the statute authorized the leasing of allotted lands without restrictions. However, the Secretary of the Interior objected to the absence of restrictions, observing that "[e]xperience has shown that this is unjust to the Indians, as the inrush of prospective miners is always prejudicial to the Indians' interests, and, in justice to them, the Department should not recommend favorable action on any bill that would render them insecure in their homes." H.R. Rep. No. 1225, 60th Cong., 1st Sess. 2 (1908). The bill was then amended to address the Secretary's concerns. Id. The Federal Circuit has concluded that, in enacting 25 U.S.C. S 396, "Congress was much interested in having [the] Interior [Department] oversee the leasing of the Indian lands so as to prevent exploitation

of and prejudice to the Indians' interest, or injustice to them." Pawnee v. United States, 830 F.2d 187, 189 n.2 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988) (citing H.R. Rep. No. 1225, 60th Cong., 1st Sess. 1-2 (1908)).

The statute authorizing the Secretary to approve communitization agreements on allotted and tribal lands, 25 U.S.C. § 396d, was enacted with a similar purpose. Section 396d is part of the Indian Mineral Leasing Act, which we examined in Jicarilla and which Congress passed in order "to achieve uniformity in tribal leasing matters; to increase Indian authority in granting leases; and to protect the Indians' economic return on their property." Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation, 792 F.2d 782, 796 (9th Cir. 1986). Section 396d gives the Secretary and his or her delegates broad discretion to approve or disapprove communitization agreements governing leases of Indian land. Kenai Oil & Gas, Inc. v.

Department of the Interior, 671 F.2d 383, 386 (10th Cir. 1982). An accompanying regulation, 25 C.F.R. § 212.24(c), provides that leases of allotted lands "shall be subject to a cooperative unit or development plan affecting the leased lands if and when required by the Secretary of the Interior." Like 25 U.S.C. § 396d, Section 212.24(c) places no limits on the Secretary's discretion in assessing communitization agreements. However, it is part of the general regulatory framework governing the leasing of Indian lands that requires the Secretary and his or her delegates to act in the best interests of Indian mineral owners. See Jicarilla, 728 F.2d at 1565.

Accordingly, in deciding whether to approve or disapprove communitization agreements governing allotted lands such as those at issue here, the Secretary must act as a fiduciary for Indian mineral owners, guided by the same exacting standards that we outlined

in Jicarilla. See Pawnee, 830 F.2d at 190. In exercising this duty to the Indian owners, "[n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." Seminole Nation, 316 U.S. at 297 n.12 (quoting Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) (Cardozo, J.)). That fiduciary duty of utter loyalty, combined with our narrow standard of review, should guide our analysis of the Assistant Secretary's decision to disapprove the Woods communitization agreement.

B. Kenai, Cheyenne-Arapaho, and Cotton Petroleum

We have discussed the Secretary's obligation in evaluating communitization agreements affecting leases of tribal and allotted lands in several prior cases: Cheyenne-Arapaho Tribes v. United States, 966 F.2d 583 (10th Cir. 1992), cert. denied, 113 S. Ct. 1642, and 113 S. Ct. 1643 (1993); Cotton Petroleum Corp. v. Department of the Interior, 870 F.2d 1515 (10th Cir. 1989); and

Kenai, supra, 671 F.2d 383. The majority reads those decisions as establishing a uniform body of law that provides that, in assessing a communitization agreement, the Secretary must consider all the relevant factors and may not treat one factor as determinative. I agree that we have consistently directed the Secretary to consider all the relevant factors. However, I believe that our cases are in conflict as to whether particular factors may be determinative. An examination of our prior decisions illustrates this conflict.

In Kenai, we held that the Secretary's designate, the Superintendent of the Bureau of Indian Affairs (BIA), did not abuse his discretion when he refused to approve a communitization agreement that, if approved, would have extended the terms of several mineral leases of restricted Indian land. We reviewed testimony from the Superintendent, who had stated that he reached his decision

because he had determined that the subject tracts could be re-leased for higher royalty payments and bonuses if the original leases were not extended by the proposed communitization agreement. Noting that the Secretary and his delegates had a duty to maximize lease revenues for the Indian mineral owners, we found that Interior Department officials had no obligation to approve a plan that did not serve the best interests of the Indian owners and that they acted within their discretion "in refusing to approve an economically unsatisfactory plan." Kenai, 671 F.2d at 387.

In Cheyenne-Arapaho, we applied Kenai and found that the Secretary and his delegates breached their fiduciary obligation by approving a communitization agreement governing mineral leases in Custer County, Oklahoma. In arguing that the Interior Department had satisfied its obligations to the Cheyenne-Arapaho Tribe by approving the subject agreement, the Secretary maintained

that disapproval would create a risk that new leases could not be negotiated and that retaliatory litigation might be brought by lessees whose interests were terminated by disapproval of the agreement. We rejected that explanation, characterizing it as an argument for "across-the-board" approval of communitization agreements that was inconsistent with the required policy of maximizing tribal revenues. Cheyenne-Arapaho, 966 F.2d at 590-91. Because the market for oil and gas leases in Custer County, Oklahoma in the early 1980s was extremely favorable for mineral owners, we held that the Secretary and his delegates abused their discretion by declining to consider the market value and marketability of leases that could have been negotiated for the tribe if the subject communitization agreement had been disapproved so that more profitable leases could have been negotiated.

In Cotton Petroleum, decided after Kenai but before Cheyenne-Arapaho, we described the

Secretary's obligations in evaluating communitization agreements somewhat differently. We reversed an Interior Department decision regarding a proposed communitization agreement finding that, "[o]n the totality of the record before us," the decision constituted an abuse of discretion. Cotton Petroleum, 870 F.2d at 1529. The decision in Cotton Petroleum concerned a proposed communitization agreement that was submitted shortly before a mineral lease of a restricted Indian allotment was scheduled to expire. Just as in Kenai and Cheyenne-Arapaho, one effect of the proposed agreement was to extend the terms of underlying leases. An Area Director of the BIA approved the agreement, but an Assistant Secretary (rendering a final decision for the Interior Department) reversed the Area Director's decision and disapproved the agreement.

In particular, the Assistant Secretary found that approval of the agreement was not

in the best interests of an Indian mineral owner. However, after disapproving the subject agreement, the Assistant Secretary proceeded to include the subject tract within the unit established by the communitization agreement and to rule that the Indian mineral owner was entitled to royalties under the terms of the very communitization agreement that he had disapproved. Id. at 1520-21, 1527.

In reversing the Assistant Secretary's decision, we noted the inconsistency of disapproving the communitization agreement for purposes of allowing the subject lease to terminate so that a new, more lucrative lease could be negotiated, and then including the subject tract in a unit and awarding royalties under the same partially rejected agreement. See id. at 1527 ("To reject the communitization agreement and then immediately to affirm it and to award the ... appellees retroactive benefits under it exposes the arbitrary and

capricious nature of the Secretary's action."). We also observed that the Assistant Secretary's decision was inconsistent with the Department's treatment of other Indian lessors in the same unit area. Specifically, the Area Director of the BIA had unequivocally approved the same communitization agreement as to other Indian leases within the same proposed unit. We found no adequate and reasoned explanation in the record of the differing treatment afforded similarly situated Indian lessors. Id.

However, in addition to these factors, we based our reversal of the Assistant Secretary's decision in Cotton Petroleum on reasoning that I find inconsistent with Kenai and Cheyenne-Arapaho. In particular, we criticized the Assistant Secretary for failing to evaluate the communitization agreement "on its merits" and for using his decision partially disapproving the proposed agreement as "a triggering event to cause the termina-

tion of a separate instrument, the lease." Id. at 1528. Compare Kenai, 671 F.2d at 386 (affirming disapproval of communitization agreement on the basis of its effect on the underlying leases).

Finally, in Cotton Petroleum, as the majority notes, we found that the Assistant Secretary had failed to consider the following relevant factors in reaching his decision: (1) whether the long-term economic effects of the proposed communitization agreement served the best interests of the Indian lessors; (2) whether the geological and engineering aspects of the agreement furthered those interests; and (3) whether the lessee had complied with the terms of the lease, including commencing drilling operations within the proposed unit prior to the expiration of the Indian leases. Cotton Petroleum, 870 F.2d at 1518, 1525. These factors, we explained, were set forth in the BIA guidelines (promulgated in response to our Kenai decision) regarding the evaluation

of communitization agreements. We focused on the Assistant Secretary's final written decision, observing that he did not discuss the guideline factors and made no effort to explain his failure to do so. Id. at 1526.

C. Communitization Agreements and Underlying Leases

In light of these prior decisions, we are presented with contrasting principles to apply. Kenai holds that the Secretary may disapprove a particular communitization agreement in order to allow underlying leases to expire and new, more profitable leases to be negotiated. Cheyenne-Arapaho finds that the Secretary breached his fiduciary obligation to Indian mineral interest owners by failing to consider the economic benefit that they would obtain through the disapproval of a particular communitization agreement. Our conclusion in Cheyenne-Arapaho that the Secretary breached his fiduciary duty is based on the principle that the Secretary could have properly decided to disapprove the communiti-

zation agreement for the specific purpose of allowing new, more profitable leases to be negotiated. In contrast, Cotton Petroleum declares that it is improper for the Secretary to base a decision regarding a communitization agreement on its effect on an underlying lease.

Finding this case analogous to Cotton Petroleum, the majority concludes that, in a particular circumstance, it is improper for the Secretary to disapprove a communitization agreement on the basis of the agreement's effect on underlying leases. According to the majority, the Secretary acts arbitrarily and capriciously and abuses his or her discretion when he or she disapproves a specific agreement in order to allow Indian mineral owners to negotiate more profitable leases and then subsequently approves a second communitization agreement that establishes the same unit area as the agreement that he has previously rejected. In so holding, I believe that the

majority reads Cotton Petroleum too expansively and implicitly rejects important principles set forth in Kenai and Cheyenne-Arapaho, thereby transforming the Secretary into something less than a fiduciary for the Indian mineral owners and our review of Interior Department decisions into something more than a search for arbitrary and capricious action. For several reasons, I find the reasoning of Kenai and Cheyenne-Arapaho more convincing on this issue, and I think it should apply.

First, nothing in the applicable statutes and regulations prevents the Secretary from considering the manner in which a proposed communitization agreement impacts upon underlying leases. A plain reading of 25 U.S.C § 396 gives the Secretary broad discretion to perform "any and all acts" and to make all such rules and regulations that are necessary to carrying out its provisions. Similarly, the terms of 25 U.S.C. § 396d and 25 C.F.R. §

212.24(c) place no constraints on the Secretary's discretion.

In the absence of specific statutory or regulatory limitations, the Secretary's discretion is controlled by the fiduciary obligation that governs the leasing of Indian mineral interests. It cannot be disputed that this fiduciary obligation has an economic component. See Jicarilla, 728 F.2d at 1568 ("[T]he purpose of the Indian Mineral Leasing Act is to ensure that Indian tribes receive the maximum benefit from mineral deposits on their lands, ... and we should construe regulations enacted under this Act in light of this purpose.") (emphasis added); Kenai, 671 F.2d at 386 ("As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues.") (emphasis added) (citation omitted). Indeed, a damages remedy is available to Indian owners when the federal government breaches its

fiduciary obligations. See United States v. Mitchell, 463 U.S. 206, 228 (1983). The Supreme Court has stated that "[i]t would be anomalous to conclude that these enactments [establishing a fiduciary relationship] create a right to the value of certain resources when the Secretary lives up to his duties, but no right to the value of the resources if the Secretary's duties are not performed." Id. at 227. Of course, the economic exploitation of the land and resources of Indian peoples has permeated our history, making the need for exacting fiduciary standards all the more urgent. See generally United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979) (discussing Indian removal policy), remanded on other grounds, 623 F.2d 448 (6th Cir. 1980). Chronicling the history of Indians in Oklahoma, Dr. Angie Debo has described an "orgy of exploitation" that is "almost beyond belief." Angie Debo, And Still the Waters Run vii (1st ed. 1940). Dr. Debo notes, "Within a

generation, these Indians, who had owned and governed a region greater in area and potential wealth than many an American state, were almost stripped of their holdings and were rescued from starvation only through public charity." Id. Over the last twenty-five years, partly in response to the work of Dr. Debo and other scholars, the President and Congress have repeatedly recognized this exploitation and have taken laudable steps to prevent it. See Pevar, supra, at 8-11.

In light of the broad authority granted by 25 U.S.C. § 396, 25 U.S.C. § 396d, and 25 C.F.R. § 212.24(c), and in light of the Secretary's overriding fiduciary obligation, I see no reason why the Secretary should be prevented from considering the effect of a communitization agreement on underlying leases. As this case illustrates, the economic effect of the continuation or expiration of a lease is often substantial. Lessees such as Woods and Tomlinson no doubt

seek communitization in part because of the effect that it will have on underlying leases. To bar the Secretary from considering this effect on behalf of the Indian lessors prevents him from assessing an important factor that directly impacts on the economic welfare of those whom he has the highest duty to protect.

Contrary to the majority's suggestion that it is "duplicitous" for the Secretary to base a decision regarding a particular agreement on the manner in which it affects an underlying lease, maj. op. at 15, I view that effect as one of several consequences of this kind of agreement that the Secretary ought to consider. Agreements such as the ones proposed by Woods and Tomlinson extend the terms of leases that contain "commence drilling" clauses by stipulating that:

> the actual drilling, completion, continued operation or production of a well or wells for communitized

substances on the communitized area shall be construed and considered as the actual drilling, completing, continued operation or production from each and all of the lands within and comprising said communitized area.

Applts. App. at 3-4. I do not understand why this kind of clause (which often has tremendous economic consequences for all the parties) should be insulated from the Secretary's fiduciary scrutiny when he reviews an agreement.

Nor do I see any contractual impediments to the Secretary's consideration of how a communitization agreement affects an underlying lease. The leases at issue contain a clause that states that the parties "agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively

adopted by a majority operating interest therein and approved by the Secretary of the Interior." Applts. App. at 79, 83. (emphasis added). Thus, the leases in no way establish a right to communitization or to the continuation of their primary terms through the approval of a communitization agreement. They expressly commit the decision regarding approval of a particular agreement to the discretion of the Secretary, and they do not purport to limit his exercise of discretion.

Moreover, in this case, contrary to the panel opinion's suggestion, neither the Assistant Secretary nor the Indian mineral owners sought to "rescind or escape a contract." Woods Petroleum Corp. v. Department of the Interior, 18 F.3d 854, 859 (10th Cir. 1994). The leases here at issue had primary terms of five years. During that time, Woods and the other lessees had the right to drill on the subject allotted tracts or submit a communitization agreement to the

Secretary. Nothing in the record indicates the Secretary or the Indian mineral owners sought to prevent the lessees from exercising their contractual right to drill for minerals. The fact that Woods never drilled a well on the subject tracts, only began to drill a well on an adjacent tract some six weeks prior to the end of the primary terms of the leases, and did not tender a completely executed communitization agreement to the BIA until eight days before the end of those primary terms cannot be attributed to any contractual breach by Interior Department officials or the Indian mineral owners. See maj. op. at 5; Applts. App. at 77, 80-81, 84 (primary terms expired on February 25, 1982). In such a situation, disapproval of the Woods agreement on the basis of its effect on the underlying leases was a decision that the leases permitted; there was no escape or rescission of a contractual obligation by either the

Assistant Secretary or the Indian mineral owners.

In addition, in my opinion, the requirement that the Secretary consider all the relevant factors in assessing communitization agreements does not prevent her or him from basing a decision on the effect that a particular agreement has on underlying leases. To be sure, in reversing the Secretary's decisions, both Cotton Petroleum and the majority rely on the BIA's post-Kenai guidelines concerning the evaluation of communitization agreements. However, although those guidelines direct BIA directors and superintendents to consider certain factors and to issue written explanations of their conclusions, they do not purport to suggest what weight must given to each factor. Thus, if a particular agreement is determined to be geologically and technically warranted but not in the best economic interests of the Indian lessors, the guidelines are silent as to

whether the Secretary and his or her delegates should rely on the factors that support approval of the agreement or the factors that suggest that it should be disapproved. The weighing of the factors is a matter that the guidelines leave to the discretion of Interior Department officials, who must act in accordance with their fiduciary obligation to Indian mineral owners. In my judgment, as long as the record of Interior Department proceedings indicates that the Secretary and his or her delegates considered the guideline factors, they may certainly determine that one of those factors (such as the economic benefits that the Indian owners would obtain from the negotiation of new leases) outweighs the others and should be dispositive as to whether a particular agreement is approved or disapproved.

Finally, I am unconvinced by the majority's conclusion that the Secretary's approval of a second communitization agreement

establishing the same unit area as a previously rejected agreement signifies that it was improper for the Secretary to have based the disapproval of the first agreement on its effect on underlying leases. In so holding, the majority essentially concludes that although the Secretary should consider the economic effects of communitization generally, see maj. op. at 17, he or she is barred from considering the substantial economic effect of a decision to approve or disapprove a specific agreement at a particular time I discern nothing in the Indian Mineral Leasing Act, accompanying regulations, or federal law concerning the Secretary's fiduciary duties that so limits his or her discretion.

D. The Assistant Secretary's Consideration of the Relevant Factors in this Case

In addition to concluding that it was improper for the Assistant Secretary to base his decision regarding the approval or

disapproval of the subject communitization agreement on the effect of that agreement on underlying leases, the majority finds that the Assistant Secretary did not consider the relevant factors. I disagree with that conclusion as well.

As the majority notes, after the Indian lessors appealed the BIA Area Director's initial approval of the Woods communitization agreement to the Office of the Secretary, the Deputy Assistant Secretary requested a "best-interest assessment" from the Department's Branch of Energy and Minerals Assistance. Applts. App. at 112-14. In its written report, the Energy and Minerals Branch analyzed the various consequences that might result from the approval or disapproval of the Woods communitization agreement. The report favored approval of the agreement, concluding that if the agreement was approved, the Indian lessors would "immediately receive" $384,675.74 in accrued royalties and interest

from production from the unit well. Id. at 114. Contrary to the majority's characterization, the report did not find that, if the Woods communitization agreement was disapproved, the Indian mineral owners would "forfeit" these royalties. Maj. op. at 7. Instead, the report noted that there might be some question as to who was entitled to the escrowed funds. See Applts. App. at 114 (noting that, if the Woods agreement was disapproved, "[t]he Indian mineral interests will no longer be considered under lease to Woods" and that "[t]his raises the issue of who should receive the royalties currently in escrow"). The report also stated that if the Woods agreement was not approved, the prospect of re-leasing the Indian tracts was "not very good" and "even if a large bonus were received, the prospect of receiving future royalties from production is not guaranteed." Applts. App. at 117.

The Deputy Assistant Secretary then appropriately, and in my view necessarily, invited the Indian mineral owners and Woods to respond to this report. Indeed, because there is no indication that the Indian owners were notified of the Corporation Commission proceedings, the Interior Department proceedings may have been the only chance for these Indian owners to be heard regarding their position as to the proper development of their mineral interests.

The Indian owners filed a response disputing the report's conclusions. They challenged the conclusion that future leasing prospects were "not very good," stating, "There does exist a potential lessee who is willing to lease the mineral interests of the Indian owners and pay bonus monies in excess of $400,000.00." Applts. App. at 119. They added:

> The potential lessee is fully aware of any possible litigation occurring

in the Federal Courts and the Secretary may rest assured that a valid oil and gas mining lease will be entered into by and between the potential lessee and the Indian mineral owners immediately upon the disapproval of the Communitization Agreement and the invalid leases with Woods Petroleum Company.

Id.

The Indian mineral owners also maintained that, if the Woods agreement was disapproved such that new leases could be negotiated, they would seek to join their mineral interests to the rest of Section 17 of Custer County through a subsequent communitization agreement. They argued that under such an agreement they would be entitled to a proportional share of the revenues from the unit wells from the date of first production and cited a decision, Samedan Oil Corp. v. Cotton Petroleum Corp., 466 F. Supp. 521, 525 (W.D.

Okla. 1978), which upheld a communitization agreement governing Indian land that had been given retroactive effect to the date of first production. Applts. App. at 122.

Finally, the Indian owners argued that, under principles established in several oil and gas decisions, the disapproval of the Woods agreement also entitled them (as owners of unleased tracts) to working interest revenues from the date of first production in Section 17. Under this theory, the Indian owners estimated that they would be entitled to approximately $1,920,000. Applts. App. at 119, 123-24. Woods filed a response agreeing with the report of the Energy and Minerals Branch and disputing the analysis of the Indian mineral owners. Applts. App. at 126-27.

These documents from the administrative proceedings demonstrate that, at the time that the Assistant Secretary issued his final decision in May of 1986, there was conflicting

evidence before him as to whether approval of the Woods agreement was in the best interests of the Indian mineral owners. The submissions from the Energy and Minerals Branch of the BIA and from the Indian mineral owners establish that reasonable arguments could be made both in support of and in opposition to the Woods communitization agreement. However, in light of the majority's characterization of the disapproval of the Woods agreement as an unreasonable, arbitrary, and capricious act, it should be noted that the report of the Energy and Minerals Branch (which recommended approval of the agreement) turned out to be incorrect about one important factor: just as the Indian mineral interest owners reported, a new lessee was available and did pay a $400,000 bonus to lease the subject allotted tracts. In any event, in his final decision for the Interior Department, although the Assistant Secretary referred to the initial recommendation of the Department's Minerals

Management Service that the unit proposed by the Woods agreement was economically and geologically proper, he found that the $400,000 bonus that the Indian lessors could obtain if new leases were negotiated made disapproval of the agreement in their best economic interest.

As to this particular finding of the Assistant Secretary, my disagreement with the majority concerns the application of the requirement that agency officials must consider the relevant factors. Following Cotton Petroleum, the majority focuses on the Interior Department's final written decision and seems to require an item-by-item discussion of each factor articulated in the BIA guidelines. If that is what the relevant factors requirement entails, then I would agree that the Assistant Secretary did not satisfy it here. In particular, his May 1986 decision does not discuss one of the BIA factors at all: the lessees' compliance with

the terms of the underlying leases. In addition, aside from a brief reference to the Minerals Management Service's conclusion that the proposed unit was geologically and economically proper, the decision does not discuss geological, engineering, and technical aspects of the agreement.

However, in my opinion, the applicable law does not and should not require the official to itemize "each and every factor discarded as well as the factors taken into account in order to reach a reasoned decision." Cotton Petroleum, 870 F.2d at 1531 (McKay, J., dissenting). In fact, the decisions on which the majority relies distinguish between an agency's duty to consider factors in making a decision and its duty to articulate the reasons for a particular decision. As to the first of these duties, a court may examine the entire administrative record in order to determine whether the relevant factors have been considered. See

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); cf. United States v. Morgano, ____ F.3d. ____, Nos. 92-1828, 92-1829, 92-2069, 92-2144, 92-2224, 1994 WL 559518, at *11 (7th Cir. Oct. 13, 1994) ("Because the statutes and Guidelines only mandate the sentencing court to 'consider' the relevant factors, the district court is under no obligation to enter specific findings as to each factor. The record must merely indicate the court considered the statutory factors, in general, in arriving at the fine.").

In contrast, the agency's duty to articulate its reasoning applies to its final decision. In order to satisfy this duty, an agency need only provide "a satisfactory explanation for its action including 'a rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). Under this requirement, a court

may uphold a decision "of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transp., Inc., v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974).

I believe that the majority errs in requiring the final decision-maker to engage in a factor-by-factor discussion of each relevant factor regarding the evaluation of a communitization agreement. Significantly, in Kenai, the only case in our communitization trilogy in which we affirmed an Interior Department decision regarding a communitization agreement and the first of these cases in which we applied the relevant factors requirement to agency evaluations of such agreements, we did not require such a factor-by-factor discussion. Instead, we deemed sufficient the BIA Superintendent's testimony that the leases underlying the proposed agreement could be renegotiated for higher

royalty payments and bonuses if the agreement was disapproved. Kenai, 671 F.2d at 387.[1]

In this case, the best-interest analysis requested by the Deputy Assistant Secretary, the responses to that analysis from the Indian mineral owners and Woods, and the Assistant Secretary's explanation of the grounds for his decision clearly demonstrate that the Interior Department considered the relevant factors in making its final decision. Indeed, a review

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[1]Moreover, the language of the BIA guidelines does not support the majority's requirement that the Interior Department's final decision-maker must engage in a factor-by-factor discussion in the document that sets forth his decision. The guidelines simply require that a written statement discussing the listed factors be prepared by the final decision-maker's subordinates--BIA Area Directors and Superintendents. As to the final decision reached by the Interior Department after an Area Director's or Superintendent's decision is appealed, the guidelines are silent as to the level of specificity with which the responsible agency official must discuss the various factors. Applts. App. at 93-94. I do not believe that the majority sufficiently explains the basis for extending the requirement to discuss specific factors beyond what the BIA guidelines require, particularly when the required factor-by-factor analysis has been conducted by a subordinate BIA official and is contained in the record that the final agency decision-maker reviews.

of the report of the Energy and Minerals Branch, which the Deputy Assistant Secretary specifically requested in order to assist in the decision regarding the Woods communitization agreement, indicates that a wide variety of factors were considered and discussed, including: the market for negotiating new leases if the Woods agreement was disapproved, drainage of the allotted tracts from unit wells, the amount of royalties that the Indian owners would receive from the proposed unit, the possibility of litigation, and the amount of production from wells drilled within the proposed unit. Applts. App. at 114-17. Moreover, the Indian lessors' response to this report (which the Deputy Assistant Secretary also requested) discusses many of these same factors. Id. at 118-25.

Although the Assistant Secretary did not discuss many of these specific factors in his final May 1986 decision, I simply do not think

that he was required to do so. Moreover, the discretion as to whether to approve the agreement was his and not his subordinate's, and as long as he gave a reasoned explanation of his decision, he was free to disagree with the conclusions reached in the report of the Energy and Minerals Branch of the BIA. By explaining, after thorough review, that he deemed it to be in the best interests of the Indian owners to disapprove the Woods agreement and to allow negotiation of new leases and the payment of a $400,000 bonus, I find that he sufficiently articulated a reasoned basis for his decision that was not arbitrary, capricious, or an abuse of discretion. The majority's decision to the contrary bodes ill for our future review of administrative decisions, for it suggests that agencies may be required to engage in factor-by-factor discussions not required by their own guidelines or by our prior cases.

Moreover, in my judgment, the record evinces the kind of comprehensive scrutiny that modern federal Indian policy requires. Acting pursuant to a statute (25 U.S.C. § 396d) passed, in part, to increase Indian authority over mineral leases and protect Indians' economic return on their property, Assiniboine & Sioux Tribes, 792 F.2d at 796, the Assistant Secretary reached a decision that comports with those aims.

E. Other Indications of Unreasonableness

The majority also focuses on two other elements of the Assistant Secretary's decision that it finds unreasonable, arbitrary, and capricious. First, the majority notes that after disapproving the Woods communitization agreement in May 1986, the Assistant Secretary approved an "identical" communitization agreement submitted by the new lessee of the Indian tracts, Tomlinson Properties, Inc., in September 1986. Maj. op. at 18. Moreover, the majority notes, the Assistant Secretary made

the Tomlinson agreement retroactive to September 1982, the date of first production in section 17 of Custer County. In my judgment, neither of these decisions regarding the Tomlinson agreement renders the Assistant Secretary's actions unreasonable, arbitrary, or capricious.

In finding that approval of the Tomlinson communitization agreement indicates that the Secretary acted improperly in assessing the Woods agreement, I think that the majority ignores the applicable regulations, the BIA guidelines, and the Secretary's fiduciary obligations. 25 U.S.C. § 396d, 25 C.F.R. § 212.24(c), and the BIA regulations focus on decisions as to particular agreements and plans. The decision that § 396d and § 212.24(c) authorize the Secretary to make, and for which the BIA has established guidelines, concerns whether a specific agreement or plan is in the best interests of the Indian lessors. As the district court observed, the

decision is not whether the tracts in question should ever be communitized, but whether a particular agreement or plan should be approved. Applts. App. at 326.

In this case, although the Woods agreement and the Tomlinson agreement both organized the same tracts into a unit, they had different economic effects. The Woods agreement, if approved, would have extended lease nos. 14-20-205-7048, 14-20-205-7049, and 14-20-205-7050. In contrast, the Tomlinson agreement was submitted after the Woods leases had expired and after the subject allotted tracts had been re-leased for a substantial bonus. In treating these two agreements differently, the Assistant Secretary did what his fiduciary responsibilities, Kenai, and Cheyenne-Arapaho authorize him to do: he considered the economic aspects of particular agreements in making his decision. To say, as the majority does, that the Woods agreement and the Tomlinson agreement were "identical,"

is to ignore their differing effects on the very individuals whose interests should be a touchstone to both the Secretary's and this court's analysis.

As to this issue, I also do not believe that Cotton Petroleum supports the majority's reasoning. In that case, the Assistant Secretary disapproved a proposed communitization agreement in one respect (so that the underlying lease would expire) and then approved the same agreement so that the Indian mineral owner could participate in the proposed unit. In the instant case, the Assistant Secretary did not simultaneously approve and disapprove the Woods agreement or the Tomlinson agreement. Rather, he evaluated the two agreements differently because of their contrasting economic effects on the Indian owners.

Finally, I do not find the Assistant Secretary's decision giving the Tomlinson agreement retroactive effect to be arbitrary,

capricious, or unreasonable. Upon the disapproval of the Woods communitization agreement, the subject allotted tracts became unleased for the period from February 1982 (the end of their primary terms) until the execution of the Tomlinson leases in May 1986. However, several wells had been completed on adjacent tracts, and in its report to the Assistant Secretary, the Energy and Minerals Branch found that the allotted tracts at issue here were subject to drainage. Applts. App. at 114. By giving the Tomlinson agreement retroactive effect, the Assistant Secretary allowed the Indian owners to participate in production from wells that, according to the record before him, had drained oil and gas reserves from their allotted tracts.

Rather than "demonstrating the arbitrariness of his action," maj. op. at 19, the decision giving the Tomlinson agreement retroactive effect is one that is frequently made in analogous circumstances by officials

responsible for regulating oil and gas production. See, e.g., Shearn v. Ward Petroleum Corp., 808 F. Supp. 1530, 1534 (W.D. Okla. 1992); Texaco, Inc. v. Industrial-Comm'n, 448 N.W.2d 621 (N.D. 1989); Roberts v. Funk Exploration, Inc., 764 P.2d 147 (Okla. 1988); Bennion v. Utah State Bd. of Oil, Gas, & Mining, 675 P.2d 1135, 1142 (Utah 1983); Ward v. Corporation Comm'n, 501 P.2d 503 (Okla. 1972). In deciding whether to make a particular agreement or order retroactive, the focus is often on whether it is equitable to afford mineral owners that benefit. See, e.g., Roberts, 764 P.2d at 148; Bennion, 675 P.2d at 1142. In turn, that inquiry requires an examination of whether there were other means available to the mineral owners to mine their interests during the period covered by the proposed agreement or order. Thus, if a spacing or pooling order prevented mineral owners from mining their interests themselves and if ongoing production on adjacent tracts

has subjected their resources to drainage, courts have found it equitable to allow those owners to reap the benefits of production on adjacent tracts by means of a retroactive unitization agreement or order. See, e.g., Bennion, 675 P.2d at 1142; Ward, 501 P.2d at 507. On the other hand, if there were no legal impediments to the owners' mining of their own interests during the disputed period, then courts have refused to make agreements and orders retroactive. See, e.g., Cowling v. Board of Oil, Gas, & Mining, 830 P.2d 220 (Utah 1991).

For example, in Roberts, 764 P.2d at 148, the Supreme Court of Oklahoma held that the Oklahoma Corporation Commission acted properly by giving a spacing order retroactive effect in order to protect the correlative rights of certain royalty interest owners. The court noted that there had been protracted proceedings before the Corporation Commission prior to the entry of the order and that the

royalty owners' tracts had been subject to drainage from the date of first production in the unit. Id.

In this case, from the initial approval of the Woods agreement in April 1982 until the agreement's final disapproval in May 1986, the Woods agreement and the underlying leases that it extended vested the right to develop the subject tracts exclusively in the working interest owners. Applts. App. at 3, 77, 81. Thus, by operation of the Woods agreement, the Indian owners were prevented from developing their own tracts independently. Moreover, from the commencement of the BIA's initial evaluation in 1982 (prior to the date of first production in the proposed unit), the Indian mineral owners consistently opposed the Woods agreement. Accordingly, just as in Roberts and analogous cases, affording the Tomlinson agreement retroactive effect was not an arbitrary, capricious, or unreasonable way for the Assistant Secretary to allow the Indian

owners the benefits of production that the Energy and Minerals Branch had found to be derived, in part, from the mining of their interests through wells on adjacent tracts.

F. Guidance for the Secretary

We granted rehearing in this case to clarify the standards under which the Secretary should evaluate communitization agreements governing leases on Indian land. I do not believe that the majority's decision provides the necessary clarification.

The majority's holding is fact-specific. It concludes that the Secretary acts arbitrarily and abuses his discretion when he: (1) disapproves a communitization agreement for the sole purpose of allowing underlying leases to expire and new leases to be negotiated, (2) approves a communitization agreement for the newly negotiated leases that establishes the same unit area as the previously rejected agreement, and (3) allows Indian lessors to collect royalties retroactively to the date of

first production. However, the majority reaches this conclusion without reversing or expressly limiting Kenai or Cheyenne-Arapaho. Thus, in approving or disapproving communitization agreements, the Secretary presumably still has a duty to act as a fiduciary for the Indian mineral owners, to maximize their lease revenues, and to consider the benefits that may be obtained by the Indian owners if a communitization agreement is disapproved and new leases are negotiated.

In light of the majority's holding, the Secretary is now in a precarious position. If he is presented with a communitization agreement that operates to extend underlying leases, he must still consider whether it would be more beneficial to the Indian owners to allow the leases to expire and to negotiate new leases. If he does not consider the market value and marketability of new leases, he breaches his fiduciary duty under Cheyenne-Arapaho and the federal law that establishes

his obligations to Indian mineral owners. However, if he determines that disapproval of the agreement and the negotiation of new leases is in the best interests of the Indian owners, then he may have acted unreasonably and arbitrarily under the majority's holding here. Moreover, under the majority's reasoning, whether the Secretary's disapproval of a communitization agreement is unreasonable and arbitrary depends on a course of events that follows his initial decision and that the Secretary may not be able to predict. Thus, according to the majority, if a communitization agreement is disapproved, new leases are negotiated, and a new communitization agreement establishing the same unit area as the rejected agreement is submitted to the Secretary, his approval of the second agreement makes his disapproval of the first one unreasonable. However, if the Secretary disapproves an agreement and new leases are negotiated but, for reasons that the Secretary

may not been aware of at the time of the disapproval, a new communitization agreement is not submitted (or a substantially different communitization agreement is submitted), then the disapproval of the first agreement apparently would pass the majority's reasonableness test. To make the reasonableness of the Secretary's decision dependent on future events deprives him of objective standards that might offer him some guidance as to whether he is making a proper decision at the time he is required to make it.

The need for such objective standards is illustrated by the history of this case. For over twelve years, beginning with the objections to the Woods communitization agreement that the Indian owners first submitted to the Anadarko Area Director of the BIA, the parties have contested the issue of whether the Secretary and his delegates should approve the Woods communitization agreement. Until the matter is finally resolved, lessees such as

Woods and Tomlinson remain uncertain of their rights under the various mineral leases that they have negotiated. Royalty funds to which the Indian mineral owners are entitled remain in escrow, and Interior Department officials are caught between their fiduciary responsibilities to the Indian owners and limitations on those duties imposed by Cotton Petroleum and this case. By failing to offer the necessary guidance to the Secretary and those affected by his decisions, the majority's ruling leaves all of the interested parties uncertain as to their rights and responsibilities. I fear that more tortuous litigation will result.

G. Conclusion

By requiring the Secretary to engage in a point-by-point analysis in which he must apparently afford all relevant factors equal weight when he evaluates a communitization agreement, the majority deprives him of the discretion to consider his primary duty--the

economic protection of Indian mineral owners. By significantly limiting the Secretary's ability to base his decision as to a particular communitization agreement on its effect on underlying leases, the majority greatly diminishes the Secretary's ability to protect his charge. By failing to recognize the primary importance of protecting the economic rights of Indians, the court lets other mechanistic factors deprive the owners of these minerals of thousands of dollars. By second-guessing every aspect of the Secretary's judgment, the court undermines the generally established standard of review for administrative decisions, requiring of the Secretary a detailed analysis that we do not require of other agencies. Finally, by holding that the Assistant Secretary lacked the discretion to disapprove an eleventh-hour communitization agreement, submitted a few days before the primary terms of the under-

lying leases expired, the court deprives the Indian mineral owners of a $400,000 bonus.

Where, as here: (1) the Secretary receives a communitization agreement near the end of the primary term of a lease; (2) there is no evidence that Interior Department officials or the Indian mineral owners have prevented the lessees either from drilling on the subject tracts during the lease's primary terms or from submitting a communitization agreement earlier in that primary term; (3) the Secretary receives evidence and arguments from all affected parties as to whether to approve or disapprove the proposed agreement; and (4) there is a finding that the Indian tracts have been subject to drainage from drilling on adjacent tracts during the period in which the Secretary's decision on whether to approve a particular agreement is pending, it is certainly not an abuse of discretion for the Secretary to disapprove the proposed communitization agreement so that the Indian

mineral owners may negotiate a more profitable series of leases. In this situation, it is also not an abuse of discretion for the Secretary to approve a second communitization agreement governing the newly negotiated, more profitable leases and to give that second communitization agreement retroactive effect so that the Indian owners may receive their proportionate share of minerals drained from their allotted tracts.

I would therefore affirm the decisions of the Assistant Secretary and the district court.

§ 396. Leases of allotted lands for mining purposes

All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect: *Provided*, That if the said allottee is deceased and the heirs to or devisees of any interest in the allotment have not been determined, or, if determined, some or all of them cannot be located, the Secretary of the Interior may offer for sale leases for mining purposes to the highest responsible qualified bidder, at public auction, or on sealed bids, after notice and advertisement, upon such terms and conditions as the Secretary

of the Interior may prescribe. The Secretary of the Interior shall have the right to reject all bids whenever in his judgment the interests of the Indians will be served by so doing, and to readvertise such lease for sale.

§ 396d. Rules and regulations governing operations; limitations on oil or gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves

the development or production of oil or gas from land covered by such lease.

§ 396e. Officials authorized to approve leases

The Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

§ 212.24 Operation and development regulations

(b) All leases issued under the provisions of the regulations in this part shall be subject to imposition by the Secretary of such restrictions as to time or times for the drilling of wells and as to the production from any well or wells as in his judgment may be necessary or proper for the protection of the natural resources of the leased land and in the interests of the Indian lessor. In the exercise of his judgment the Secretary may take into consideration among other things the Federal laws, State laws or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production or both, and also any regulatory action desired by tribal authorities.

5 U.S.C.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial

review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive

opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the

terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise

reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Supreme Court, U.S.
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OFFICE OF THE CLERK

(2)

No. 94-1858

In The

Supreme Court of the United States

October Term 1994

ANNA TWINS SPOTTEDWOLF, et al.,

Petitioners,

versus

WOODS PETROLEUM CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The narrow question presented by Petitioners is whether, under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, the Court of Appeals for the Tenth Circuit properly found, under the specific facts presented, that the United States Secretary of the Interior (the "Secretary"), acted in an arbitrary manner and abused his discretion when: (1) in 1986, he ignored his own published guidelines and rejected a proper plan of communitized mineral development approved in 1982, admittedly for the sole purpose of causing existing Indian mineral leases to terminate so that the Indian Petitioners could enter into new, more lucrative leases, and (2) then immediately approved essentially identical communitization for a new lessee, determining that communitization was, in fact, proper in 1982.

The Secretary has not sought certiorari and presents no questions for review.

RESPONDENT PARTIES TO THE PROCEEDING

Woods Petroleum Corporation has been renamed Argent Energy Company. Its parent company is Sunshine Mining Company. There are no subsidiary companies.

Ratex Resources Incorporated has merged into Frontier Acquisition Corp., whose parent company is Frontier Natural Gas Corp.

Midcon Central Exploration Company's interests have been acquired by Apache Corporation.

Mustang Production Company has merged into its parent company, Mustang Fuels Company.

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No. 94-1858

In The

Supreme Court of the United States

October Term 1994

ANNA TWINS SPOTTEDWOLF, et al.,

Petitioners,

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WOODS PETROLEUM CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Appellants, Woods Petroleum Corporation (now Argent Energy Company) ("Woods"), Ratex Resources Incorporated, MidCon Central Exploration Company and Mustang Production Company (now Mustang Fuel Corporation) (collectively "Respondents"), respectfully submit this Brief In Opposition to the Petition For Writ Of Certiorari filed by Anna Twins Spottedwolf, Eleanor Stoneroad, Victor Stoneroad and Leroy

Stoneroad (the "Individual Indian Petitioners") and Tomlinson Properties, Inc. ("Tomlinson") (collectively "Petitioners").

OPINIONS BELOW

This action was taken on appeal to the Court of Appeals for the Tenth Circuit from an order of the Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, granting summary judgment in favor of Petitioners. This decision was reversed by a three-judge panel of the Court of Appeals in an opinion published at 18 F.3d 854 (10th Cir. 1994). Petitioners and the Secretary sought rehearing en banc, which was granted by the Court of Appeals. On rehearing en banc, an eight-judge majority also reversed the District Court's ruling in an opinion published at 47 F.3d 1032 (10th Cir. 1995).

STATEMENT OF JURISDICTION

Respondents concur with Petitioners' Statement of Jurisdiction to the extent that it properly identifies 28 U.S.C. § 1254(1) as the jurisdictional basis for this Court's review of Petitioners' Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents believe that this action brings into consideration the following:

Constitution of the United States of America, Amendment V; The Administrative Procedure Act, 5 U.S.C. §§ 701-706; and The Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396.

STATEMENT OF THE CASE

I.
INTRODUCTION

As a circuit embracing a substantial number of American Indian tribes, Indian reservations, and federally supervised Indian property interests, the Tenth Circuit has long been mindful of the balance between the Secretary's fiduciary duties to protect the interests of his Indian wards and the rights of non-Indians who have a business relationship with Indian interests. Here, however, the Court of Appeals was not called upon to adjust this balance. Rather, the Court of Appeals was called upon either to condone or condemn Secretarial actions that manipulated the administrative process solely to achieve an otherwise unattainable economic windfall for the Indian Petitioners.

The Court of Appeals for the Tenth Circuit chose not only to review this matter at the three-judge panel level, but also to sit en banc in order to give full consideration to the facts presented. That en banc consideration resulted in a detailed examination of the law in this substantive area, a review of the specific facts in this action, and a reconciliation of the Court of Appeals' prior decisions on communitization.[1/]

1/ In order to accomplish the orderly exploration and production of oil and gas, federal and state authorities have imposed the concept of communitized operations. Communitization occurs when administrative orders join contiguous mineral and leasehold interests into a unit for the drilling of a single well and for the proportionate sharing of the costs of, and production from, the unit well drilled. As a result of communitization, all mineral leases within a unit are "held by production" from the unit well. When this communitization includes mineral interests owned by protected American Indians, federal approval of the plan of communitized development is required. The authority to determine if communitized development is proper is congressionally conferred exclusively upon the Secretary and his delegees. In this case, the Secretary's authority emanates from 25 C.F.R. § 212.24(c).

On review en banc, eight of the ten sitting judges of the Court of Appeals held that, under the narrow facts presented, the Secretary had acted in an arbitrary manner and abused his discretion when he rejected an admittedly proper plan of communitized mineral development for the sole purpose of causing existing Indian mineral leases to terminate, and then immediately approved identical communitization, retroactive to the same time period, as "in the best interests" of the Indian lessors--after the payment of another lease bonus.[2/]

The en banc review and decision by the Court of Appeals were fact specific, correctly applied the prior teachings of this Court, and were expressly found to be consistent with other decisions of the Tenth Circuit. There is, thus, no foundation upon which to base Petitioners' request for a Writ of Certiorari from this Court.

II.
SUMMARY OF FACTS

Petitioners rely on the "Finding of Facts" articulated by the District Court below in ruling on summary judgment. Petition for a Writ of Certiorari at 4. These findings of fact fail to fully set forth the background and circumstances that surrounded the Secretary's refusal to follow his own published guidelines and the findings of his technical and legal staffs, in arbitrarily refusing to approve admittedly proper communitized development. Further, the District Court's recitation of facts does not consider the findings and analysis of the three-judge panel of the Court of Appeals for the Tenth Circuit, (Woods, 18 F.3d 854 (10th Cir.

2/ As consideration for the grant of an oil and gas lease, a lessee typically agrees to pay an initial payment or "lease bonus," usually on a "per acre" basis, plus a "royalty" stated as a percentage of the value of the minerals extracted. See generally 8 William & Meyers, Law of Oil and Gas at 103-4 (1995).

1994)), or the Court's findings and analysis en banc. (Woods, 47 F.3d 1032 (10th Cir. 1995)). A more complete recitation of the facts of this action is set forth by the opinion of the Court of Appeals en banc and is adopted here by Respondents.

In summary, the relevant facts are as follows:

Woods was the lessee of mineral interests owned by the individual Indian Petitioners comprising 117.5 net mineral acres. The lease of these minerals was duly reviewed and expressly approved by the Secretary (the "Woods Leases"). These 117.5 net mineral acres comprised only a small fraction of the mineral interests included in a 640-acre drilling and spacing unit duly approved by the State of Oklahoma through the Oklahoma Corporation Commission.[3/]

After obtaining approval from the Oklahoma Corporation Commission, Woods timely commenced the drilling of a unit well on a non-Indian tract within the unit. Woods, along with all the other working interest owners in the unit, then timely sought approval by the Secretary of a communitization agreement (the "Communitization Agreement").[4/]

In a multi-level process, the Communitization Agreement was reviewed and approved by the Concho Agency

---

3/ This acreage represents approximately 18% of the 640-acre drilling and spacing unit. The remaining 82% of the unit is comprised of non-Indian mineral interests.

4/ Petitioners' attempts to characterize the timing of Woods' activities in a pejorative light (see, e.g., Petition for a Writ of Certiorari at 5-6) are baseless. Woods' drilling activities, and its submission of documents to the Secretary, were all in full compliance with the terms of the Woods' Leases and the applicable federal regulations. See Woods Petroleum Corp. v. Deptartment of Interior, 47 F.3d 1032, 1040-41 n.9 (10th Cir. 1995).

Superintendent and by the Anadarko Area Director.[5/] Thereafter, a "Kenai[6/] best interest assessment" was conducted by the Department of the Interior - Bureau of Indian Affairs (the "BIA") in order to determine if the proposed communitization was in the Indian Petitioners' best interests. After concluding that it was, the BIA also approved the Communitization Agreement. In this assessment, the BIA advised the Secretary: (1) that a reversal of the Area Director's approval of the Communitization Agreement would constitute rejection of the unit created by the Oklahoma Corporation Commission's spacing order; (2) that a rejection of the drilling and spacing unit would result in a loss to the Indian-lessors of escrowed royalties, which amounted to nearly $385,000 as of March 1, 1986; (3) that "there is substantial risk that the Indian mineral owners may not receive any future royalties if [a new] lessee is unable to independently develop the tract[s];" and (4) that the prospects of developing the scattered undivided one-half Indian interests in an "unorthodox spacing pattern" were very poor. Court of Appeals Aplt. App. at 114. The Indian Petitioners objected to this approval but raised no objection to communitized development.

5/ During this review, a Department of Interior - Division of Energy and Mineral Resources, Realty Specialist reported:

> There appear to be no technical questions to address [regarding the propriety of communitization] as the completion of a well in September 1982 and another well as currently permitted seems to indicate the soundness of the Acting Area Director's decision to approve the [Communitization Agreement].

Court of Appeals Aplt. App. at 97.

6/ This test and the Secretary's guidelines were developed in direct response to the Court of Appeals decision in Kenai Oil and Gas, Inc. v. Department of Interior, 671 F.2d 383 (10th Cir. 1982). The purpose of the guidelines was to give direction and certainly to the communitization approval process by identifying the relevant factors to be considered.

The Secretary then ignored the BIA, his own technical and legal staffs,[7] as well as his own published guidelines, and rejected communitization as proposed by the Communitization Agreement, finding, without explanation, that it was not in the best interests of the Indian Petitioners "to have been included in the communitized area." Court of Appeals Aplt. App. at 133-34. The Secretary's rationale was that if communitization was rejected, the Woods Leases would terminate, allowing the Indian Petitioners to re-lease their minerals and obtain another lease bonus while still retaining revenues from the time of first production under the now-terminated Woods Leases.[8]

After rejecting the Communitization Agreement, the Indian Petitioners immediately granted new leases (avoiding the competitive bidding process) to Petitioner Tomlinson. The Secretary then approved an identical plan of communitization presented by the Indian Petitioners and their new lessee, Petitioner Tomlinson. This new plan of communitization included the same terms, covered the same lands, and was even retroactive to the same time (1982) as had already been proposed for communitization by Woods. The result was to include the Indian interests in the exact plan of communitization that the Secretary had earlier rejected, and to make the sharing of revenues retroactive to the time of first unit production -- four years earlier.

7/ The Department of Interior's Field Solicitor advised the Secretary that: "approval is indispensable to effectuate the intention of the parties at the time of contracting." Exhibit "B" to Woods' Brief in Chief to the Court of Appeals.

8/ Because the unit wells were not actually drilled on the Indian Petitioners' leases, the Indian leases could only be continued if communitization was approved, thereby attributing a portion of all oil and gas production in the unit to the Indian Petitioners' leases. Based on the small and scattered acreage interests of the Indian Petitioners, this communitized development, and not drilling on individual Indian leases, was all that could ever have been reasonably contemplated when the leases were issued.

REASONS FOR DENYING THE WRIT

Petitioners assert that a grant of their Petition is proper because the ruling of the Court of Appeals below "has decided important questions of federal law . . . which conflict with applicable decisions of this Court." Petition for a Writ of Certiorari at 10.[2/] This conclusion is both factually and legally insupportable.

First, the Court of Appeals acknowledged and properly applied the legal standards set forth by this Court for the review of administrative actions. Moreover, the Court of Appeals painstakingly reviewed and harmonized the applicable law in that Circuit.

Second, the Court of Appeals decision was a fact-specific determination of arbitrary conduct and an abuse of discretion on the part of the Secretary that is not a likely subject of repetition. In fact, in order to prevent duplication, the Secretary has issued proposed regulatory changes designed to guide his future actions.

Finally, the en banc opinion below properly determined, on the facts presented, that the Secretary had acted in an arbitrary manner and had abused his discretion, all contrary to law. There is, thus, no basis upon which Petitioners are entitled to the requested writ.

2/ Petitioners, however, fail to specifically identify any such decisions from this Court. The wholesale adoption by Petitioners of the dissenting opinion of the Honorable Judge Henry of the Court of Appeals does not cure this fatal defect. This device deprives both this Court and Respondents of the benefit not only of the conciseness required by Sup. Ct. Rule 14, but more importantly, of the identification of those arguments and authorities upon which Petitioners rely. This alone suggests the propriety of dismissal pursuant to Sup. Ct. Rule 14(j).5. Moreover, in dissent, Judge Henry argues only that the dissent would have, on the specific facts before it, struck a different balance between the interests of the Secretary and Respondents.

I.
NO SPECIAL OR IMPORTANT REASONS ARE PRESENT

Rule 10.1 of the Rules of the Supreme Court advises of the "special and important reasons" that may justify issuance of a writ of certiorari.[10/] No such reasons exist here.

Here, Petitioners do not claim there to be any conflict among the courts of appeals,[11/] or that there exists any conflict between the ruling below and any ruling of the courts of the State of Oklahoma. The decision below merely applied settled law to a specific set of facts and, therefore, does not merit plenary review.

10/ Rule 10.1 states in part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ will be granted only when there are special and important reasons therefor. The following . . . indicate the character of reasons that will be considered:
>
> > When a United States court of appeal has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Id. The policy of this Rule, i.e., the conservation of scarce judicial resources, places a heavy burden on a petitioner to define and demonstrate a substantial basis for certiorari. This requirement protects the certiorari process from becoming nothing more than another level of federal appeal as of right.

11/ Petitioners' implication that there exists some intra-circuit conflict among the Court of Appeals' opinions in Kenai, 671 F.2d 383 (10th Cir. 1982); Cotton Petroleum Corp. v. United States, 870 F.2d 1515 (10th Cir. 1989); Cheyenne Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583 (10th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1642 123 L. Ed. 2d 265 (1993); and Woods, similarly provides no basis for certiorari. This Court has routinely allowed conflicts among different panels of a court of appeals to be resolved by that court. See Wisniewski v. United States, 353 U.S. 901, 77 S. Ct. 633, 1 L. Ed.2d 658 (1957). More importantly, however, is that the existence of a conflict was directly addressed by the Court of Appeals and reconciled by its majority, en banc. Woods, 47 F.3d at 1038-40.

The actions of the Secretary giving rise to this litigation were fact specific and not likely to be repeated. The economic conditions, geological, engineering and lease factors presented to the Secretary in 1982 were unique. Moreover, in 1991, the Secretary proposed regulations further defining the process for the submission, review and approval of communitization agreements. See 56 Fed. Reg. 58,741 (Nov. 21, 1991) (proposing new regulations to be found in 25 C.F.R. § 211.28 captioned: "Unitization and Communitization agreement, and well spacing for oil, gas and geothermal resources.") Insofar as they pertain to communitization, these proposed regulations, while not yet final, would give guidance on some of the very issues raised in this action.[12/] There, thus, exists no "special or important reasons" for review by this Court and the Petition should be denied.

II.
THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARDS

The two guiding legal principles applicable in this action have always been: (1) the authority of the judiciary to review and reject improper administrative actions, and (2) the obligation of the Secretary to act, within the law, for the best interests of his Indian wards. In its en banc review, the Court of Appeals duly acknowledged, and gave deference to, each of these legal standards.

A. Scope Of Judicial Review.

It is the settled law of this Court that, where an

12/ It is through the rulemaking process that any modification of communitization approval policies, as interpreted by the Court of Appeals, should be addressed.

administrative agency has exceeded its authority or failed to follow the applicable requirements of agency regulations, judicial intervention is appropriate. Train v. City of New York, 420 U.S. 35, 95 S. Ct. 839, 43 L. Ed. 2d 1 (1975); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). Equally well settled by this Court is the concept that administrative powers are not boundless and "unless administrative action is tempered by judicial supervision, 'expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" Columbia Broadcasting Sys., Inc., v. F.C.C., 454 F.2d 1018 (D.C. Cir. 1971) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962)). See Volkswagenwerk Aktiengesellschaft v. F.M.C., 390 U.S. 261, 272, 88 S. Ct. 929, 19 L. Ed. 2d 1090 (1968).

In determining whether administrative actions are proper, this Court has advised:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manufacturers' Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). See Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974),

reh'd den. 420 U.S. 956, 95 S. Ct. 1340, 43 L. Ed. 2d 433 (1975). In reviewing the Secretary's actions here, the Court of Appeals duly acknowledged this limited scope of its review, stating:

> Under the Administrative Procedure Act, we may set aside an agency decision that is "Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); Cotton Petroleum, 870 F.2d at 1525. An agency decision may be arbitrary and capricious if it fails to consider important relevant factors. Motor Vehicle Mfrs. Ass'n; . . . Cotton Petroleum, 870 F.2d at 1525-26. Alternatively, the decision is arbitrary and capricious if there is no "rational connection between the facts found and the choice made." Bowman Transp., Inc. . . .

Woods, 47 F.3d at 1037. It was under this limited scope of review that the Court of Appeals found, on the specific facts before it, that the Secretary "acted arbitrarily and abused his discretion." Id. at 1041. Thus, the Court of Appeals conducted a proper review of the Secretary's actions in this case. Petitioners' actual complaint, that they disagree with the Court of Appeals' application of the proper legal standard to the facts here, provides no basis for a grant of certiorari.

B. The Secretary's Duty To The Indian Petitioners.

Citing Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555 (10th Cir. 1984), on reh'g, 782 F.2d 855 (10th Cir.) (en banc) modified, 793 F.2d 1171 (10th Cir.), cert. denied, 479

U.S. 970, 107 S. Ct. 471, 93 L. Ed. 2d 416 (1986), Petitioners claim that the Court of Appeals has "exalt[ed] the regulator role of the Secretary of the Interior over his fiduciary duty to Indian mineral owners." Petition for a Writ of Certiorari at i. Petitioners' assertions notwithstanding, the Court of Appeals expressly acknowledged that one of the legal principles guiding the Secretary is to "act as the Indians fiduciary and...represent the Indians' best interests." Woods, 47 F.3d at 1038. The Court of Appeals has, however, properly acknowledged the limitation on this duty that Petitioners have sought to ignore:

> Yet, as with any trustee-beneficiary relationship, the Secretary's fiduciary duty to the Indians under § 396d is not boundless and cannot be exercised in a manner that exceeds or flouts the authorizing statute and regulations. When the Secretary deviates from firmly established procedures, or exceeds the limits of his fiduciary duty, we have found an abuse of discretion and have reversed the Secretary.

Id. See also Cotton, 870 F.2d at 1526; United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990). Thus again, the Petitioners' desire to have obtained a different result when the proper legal standard was applied by the Court of Appeals to the facts here provides no basis for the requested writ.

C. Remand Was Not Necessary.

This Court has long advised that "judicial review of agency action [should not be converted] into a ping-pong game." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n. 6, 89 S. Ct. 1426, 22 L. Ed. 2d 709 (1969). Remand has specifically been found to be unnecessary where it "would be an idle and useless

formality." Id.

Here the Court of Appeals correctly found that:

> [R]emand for further explanation would be fruitless in this case because the Secretary has unequivocally explained his action as intended to facilitate the expiration of the Woods Petroleum lease and the Indians' receipt of a bonus payment from Tomlinson. With respect to the propriety of the Woods Petroleum Communization Agreement, neither the Secretary nor the Indian lessors has ever identified any deficiencies, and the Secretary's approval of the identical Tomlinson communization agreement is tantamount to an approval of the reasonableness of the Woods Petroleum communization agreement. In fact, the BIA Area Director's "best interest assessment," properly analyzed through the lens of the 1982 BIA guidelines, recommended approval of the Woods Petroleum communization agreement.

Woods, 47 F.3d at 1041.[13/] The Court of Appeals decision on the facts were, thus, in full accord with the teachings of this Court and remand was not necessary.

13/ None of the Petitioners, nor the Secretary, have ever offered, either here or below, any basis for the Secretary's rejection of communitization, other than to cause the Woods Leases to terminate. See Byron v. Heckler, 742 F.2d 1232, 1236 (10th Cir. 1984) (remand not proper "because it is highly doubtful that there would be any substantial evidence in the record [on remand] to support a finding that appellant's condition had improved to the requisite extent.").

III.
THE COURT OF APPEALS PROPERLY FOUND THE SECRETARY'S ACTIONS TO BE ARBITRARY AND CAPRICIOUS

In this action, the Court of Appeals was presented with a final order of an administrator who, in issuing that order, had: (1) failed to follow his own established guidelines, (2) failed to consider all relevant factors affecting the decision, (3) failed to demonstrate a rational connection between the evidence presented and his order, and (4) issued irreconcilably inconsistent rulings on the same question. In light of these facts, the Court of Appeals was required by the teachings of this Court to find that the administrator had acted in an arbitrary manner and had abused his discretion.

A. The Secretary Failed to Follow His Own Guidelines.

In 1982, the Court of Appeals in Kenai set out the principle of law that has governed all of its subsequent analyses of the Secretary's decisions on communitization. In Kenai, the Court of Appeals rejected a mineral lessee's claim that the Secretary "is limited to considering matters involving production and conservation on restricted Indian lands." Id., 671 F.2d at 387 (emphasis added).[14/] Instead, the Court of Appeals upheld the Secretary's authority to consider economics as a relevant factor stating:

14/ This argument was a misconstruction of the Court of Appeals' prior ruling in Phillips Pet. Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954), cert. denied, 349 U.S. 947, 75 S. Ct. 871, 99 L. Ed. 1273 (1955), where the Court of Appeals opined that it was permissible for the Secretary to consider conservation factors in reviewing proposed communitization. Id.

> In light of [the Secretary's] trust responsibilities, the [Secretary] must take the Indian's best interests into account when making any decision involving leases on tribal lands and has broad discretion to consider all factors affecting their interests.

Id. The Court of Appeals cautioned, however, that economics were not the only factor to be considered, stating: "I do not believe that in considering the broad discretion [of the Secretary] we can permit [him], simply in light of his trust responsibilities to the Indians, to refuse approval of communitization agreements if he concludes that the Indian lands within the proposed unit will fare better economically 'outside.'" Id. at 388 (J. Barrett concurring).

In direct response to Kenai, the Secretary issued specific administrative guidelines for the review of communitization agreements. See Cotton, 870 F.2d at 1518.[15/] These expressly articulated factors include: (1) "the long term economic effect of the communitization agreement;" (2) "expert geologic and engineering opinions;" and (3) whether the lessee had complied with the terms of the . . . lease in all respects." Woods, 47 F.3d at 1038 (citing Cotton, 870 F.2d at 1525). In applying these guidelines, the issue before the Secretary "is whether the communitization agreement should be approved, and it is not whether the underlying leases, which, previously had been approved by the Secretary, were a good deal or a bad deal with the benefit of hindsight." Woods, 47 F.3d at 1038-39 (emphasis in original).

15/ These guidelines are the administrative interpretations by the Secretary of the factors which are relevant in assessing whether approval is in the best interests of Indian lessors, and are entitled to deference. See Chevron, U.S.A., Inc. v. National Resources Defense Counsel, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694, reh'g denied, 468 U.S. 1227, 105 S. Ct. 28, 82 L. Ed. 2d 921 (1984).

The facts before the Court of Appeals, however, demonstrated that each of these relevant factors was ignored by the Secretary. Specifically:

(1) Long Term Economic Effects -- both the Area Director and the BIA found that the communitized development proposed by Woods was in the "best interest" of the Indian Petitioners. The Secretary ignored this analysis examining only the short-term economic windfall to the Indian Petitioners that could be effected if he caused the Woods Leases to terminate. This conclusion, based on creating a mechanism to allow Indian lessors to "have it both ways," has previously been held to be arbitrary and an abuse of discretion. Cotton, 870 F.2d at 1527. Morever, this action simply ignored the warnings by the Secretary's legal staff that, if the Indian leases were excluded from the unit, they would in all likelihood lose the opportunity to obtain their pro rata share of unit revenues. See Memorandum to the Area Director from Field Solicitor, Exhibit "B" to Woods' Brief in Chief in the Court of Appeals.

(2) Geologic And Engineering Data -- The Oklahoma Corporation Commission, the Department of the Interior-Mineral Management Service, and the Hydrocarbon Mineral Section of the BIA, each reviewed the geologic data and determined that communitized development was appropriate for the mutual benefit of all mineral owners as well as in the public conservation interest. Court of Appeals Aplt. App. at 37-40, 97, 114-17. The Secretary ignored this analysis as well, offering no explanation to support his conclusion that: "it is not in the best interest of the Indian mineral owners to have been included in the communitized area." Order of the Secretary, Id. at 130. This conclusion was directly contrary to the Secretary's subsequent approval of inclusion of the Indian Petitioners' new leases in the exact same communitized unit. Woods, 47 F. 3d at 1039.

(3) Wood's Compliance With Lease Terms -- Before the Secretary, it was undisputed that Woods had complied with all terms of the Woods Leases and applicable federal regulations. The Secretary, without explanation, literally "invented" requirements never before or since required of a lessee. See Woods, 47 F. at 1040-41 n.9. This creation of new and different criteria alone justified vacation of the Secretary's decision. See Graphic Communications Int'l Union v. Salem-Gravure Div. of World Color Press, Inc., 843 F.2d 1490 (D.C. Cir. 1988), cert. denied, 489 U.S. 1011, 109 S. Ct. 1119, 103 L. Ed. 2d 182 (1989); Green Country bilphone, Inc. v. F.C.C., 765 F.2d 235 (D.C. Cir. 1985).

In this regard, the Court of Appeals found:

> The Secretary found no factor intrinsic to the Woods Petroleum communitization agreement that merited disapproval. Indeed, the Secretary ignored the relevant communitization factors spelled out in the 1982 BIA guidelines, namely the long-term economic effects of the communitization agreement, the conservation and technical aspects of the agreement, and whether the lessee complied with the lease terms.

Woods, 47 F.3d at 1040. Such actions by an administrator have consistently been held, not only by this Court, but by many of the other court of appeals as well, to constitute arbitrary and capricious conduct. See Train, 420 U.S. at 48; Cotton, 870 F.2d at 1529; Simmons v. Block, 782 F.2d 1545, 1550 (11th Cir. 1986) ("The courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself.")(citing United States v. Heffner, 420 F.2d

809 (4th Cir. 1969)); Vista Hill Foundation, Inc. v. Heckler, 767 F.2d 556 (9th Cir. 1985). Because the Court of Appeals correctly found that the Secretary had ignored his own published guidelines in order to reach a desired short-term economic windfall for the Indian Petitioners, its reversal of the Secretary's order was proper.

B. The Secretary's Rulings Were Irreconcilably Inconsistent.

The Court of Appeals decision reversing the Secretary was also required by the fact that, in creating a mechanism to allow the Indian Petitioners to obtain a windfall, the Secretary made irreconcilably inconsistent decisions on the same facts. In 1986, in reviewing the Communitization Agreement, the Secretary found that, as of the date of proposed communitization, 1982, such development was not "in the best interests" of the Indian Petitioners. However, immediately after triggering lease termination, the Secretary reversed this decision by inserting the Indian Petitioners' interests, now subject to leases to Petitioner Tomlinson, into an identical plan of communitized development[16/] and finding it to be "in the best interests" of the Indian Petitioners to have communitization effective starting in 1982.

Prior to this action, the Court of Appeals had advised the Secretary that such a "sometimes yes, sometimes no, sometimes maybe policy . . . cannot . . . be squared with [the court's] obligations to preclude arbitrary and capricious management of [an agency's] mandate." Cotton, 870 F.2d at 1528. Thus, it was proper for the Court of Appeals to find here that:

16/ The plan subsequently approved by the Secretary contained the same terms, covered the same lands, and was made effective retroactive to a date rior to the first production from the unit drilled by Wood. In economic effect, this plan of communitized development was identical to that proposed by Wood and summarily rejected by the Secretary.

> When the Secretary first disapproved the communitization agreement for the sole purpose of causing the underlying leases to terminate, and then immediately thereafter approved an identical communitization agreement for the new leases, it is obvious that the Secretary was not really evaluating the communitization agreement at all. Rather, he was using his power in an arbitrary way to disapprove the communitization agreement as a mere vehicle to cause the underlying leases to terminate.

Woods, 47 F.3d at 1039.

IV.
THE COURT OF APPEALS CORRECTLY HELD THAT THE SECRETARY'S FIDUCIARY DUTY TO THE INDIAN PETITIONERS DOES NOT ALLOW THE SECRETARY TO IGNORE THE PROPERTY RIGHTS OF OTHERS

Petitioners argue that the Secretary, based on his fiduciary duty, is required to ignore all other factors in favor of their short-term economic gain. If, as Petitioners contend, the Secretary must ignore the property interests of Respondents in order to fulfill his fiduciary duties, then his decision is a violation of constitutionally protected rights. Constitution of the United States of America, Amendment V.

The Court of Appeals specifically acknowledged that the Secretary and his delegates act as the Indians' fiduciary. Woods, 47 F.3d at 1038. Despite the urgings of Petitioners, however, this duty does not allow or countenance the Secretary attempting to ignore the constitutionally protected rights of non-Indians in order to create an economic windfall for his wards. Id. at 1040.

Approval of the Woods Leases vested constitutionally protected property rights in the Respondents. Coomes v. Adkinson, 414 F. Supp. 975 (D.S.D. 1976); Sessions Inc. v. Morton, 348 F. Supp. 694, 699-700 (C.D. Cal. 1972), aff'd, 491 F.2d 854 (9th Cir. 1974). See also United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990). Here, the Secretary approved the Woods Leases and the property rights they conferred, and later, without lawful justification, attempted to abrogate those same rights.[17/] Such administrative action has been found to be an unconstitutional taking of property by another court of appeals as well.

In United Nuclear, plaintiff, lessee under Indian mining leases, submitted to the Secretary a mining plan which "concededly satisfied the requirements of the applicable regulations." Id. at 1436. The Indian lessors opposed the approval of the plan "either to require [the lessee] to pay more money or to cause the leases to lapse." Id. at 1434. The Secretary refused to approve the lessee's mining plan "because 'the tribe wanted more bucks, more money.'" Id. at 1435. In holding the Secretary's actions to be an unconstitutional taking of the lessee's property, the court explained:

17/ As the Court of Appeals pointed out in Cotton:

> Implicit in that approval [of the original lease] was the Secretary's approval of the parties' express promise to abide by any communitization agreement adopted for the unit and approved by the Secretary. This does not mean that the Secretary forfeited his right to examine the appropriateness of a proposed communitization agreement. It does, however, provide additional proof that the Secretary was acting arbitrarily and capriciously when he thereafter refused to approve an otherwise fair and proper communitization agreement for the sole purpose of causing the underlying lease--which the Secretary had previously approved--to expire.

Cotton, 870 F.2d at 1528 (citations omitted). See also id. at 1523 n.2.

> [The lessee] justifiably believed and expected that if its mining plan met the requirements, the Secretary would approve it. . . .
>
> . . .
>
> The Secretary's action reflects . . . an attempt to enable the Tribe to exact additional money from a company with whom it had a valid contract, which the government euphemistically describes as an attempt to encourage and promote Indian self-determination.

Id. at 1436-38. The same type of unconstitutional taking of Respondents' property would have resulted from the Secretary's actions here. Such actions were properly rejected by the Court of Appeals.[18]

V.
THE HENRY DISSENT

Petitioners urge the wholesale adoption of Honorable Judge Henry's dissenting opinion in the Court of Appeals. While certainly extensive, the dissent advocates unbridled administrative discretion on the part of the Secretary motivated by one consideration only--short-term economic gain. Both the law of this Court, and the specific facts of this action, make this position untenable. It was, therefore, properly rejected by the Court of Appeals.

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[18] The significant economic impact of the taking is amply demonstrated here by the amounts of funds deposited into escrow in the district court. Moreover, the Secretary's actions were demonstrably arbitrary and virtually precluded Respondents' "investment backed expectations" in the development of the Woods Leases. See Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986). Thus, an unconstitutional "taking" has occurred.

Three principal issues are addressed by the dissent.[19] Respondent respectfully urge that, in each case, the dissent reached an erroneous conclusion.

A. The Limits On Fiduciary Duty Issue.

The dissent asserts that the Secretary's duty is fiduciary in nature. Woods, 47 F.3d at 1042. With this assertion the Court of Appeals expressly agreed. Id. at 1038. However, without supporting authority, the dissent then argues that this duty alone must control Secretarial decision-making.[20] The dissent further urges that this duty is to be measured by one criteria--the capture of short-term revenues. This conclusion is contradicted not only

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19/ In addition, the dissent argues that any requirement on an administrator to specifically articulate and discuss the relevant factors considered in his decision-making process is untoward. This position ignores a fully developed body of administrative law requiring an administrator to fully set forth the underlying basis for its decisions. See, e.g., United States v. Chicago, M., St. P. & P. R.R., 294 U.S. 499, 510-11, 55 S. Ct. 462, 467, 79 L. Ed. 1023 (1935) ("We must know what a decision means before the duty becomes ours to say whether it is right or wrong"); SEC v. Chenery Corp., 332 U.S. 194, 196-97, 67 S. Ct. 1575, 1577, 91 L. Ed. 1995 (1947) ("It will not do for a court to be compelled to guess at the theory underlying the agency's action . . .); Baltimore & Ohio R.R. v. Aberdeen & Rockfish R.R., 393 U.S. 87, 92, 89 S. Ct. 280, 21 L. Ed. 2d 219 (1968); Citizens to Preserve Overton Park, 401 U.S. at 420; Bowman Transportation, Inc., 419 U.S. at 285-86; Dunlop v. Bachowski, 421 U.S. 560, 571-72, 573-74, 95 S. Ct. 1951, 44 L. Ed. 2d 377 (1975); Kleppe v. Delta Mining, Inc., 423 U.S. 403, 409, 96 S. Ct. 1851, 44 L. Ed. 2d 591 (1976); Columbia Broadcasting System, Inc. v. F.C.C., 454 F.2d 1018, 1029 (D.C. Cir. 1971) ("[the administrator] must explain its reasons and do more than enumerate factual differences, if any between ... similar cases; it must explain those differences to the purposes of the . . . Act.").

20/ Even the authority noted by the dissent does not support its view. Jicarilla, cited by the dissent, requires only that if "there is more than one 'reasonable' choice . . . [the Secretary] must choose the alternative that is in the best interests of the Indian tribe." 728 F.2d at 1567 (emphasis added). What the dissent urges is that any choice which results in economic gain to the Indians--even if it violates protected property rights and violates numerous precepts of law--is "reasonable." Woods, 47 F.3d at 1043. There is no legal support for this position.

by the eight-judge majority of the Court of Appeals in this action, but its prior reviews of Secretarial actions (see Kenai) and by the Secretary's own internal administrative interpretations as well.[21/]

If, as the dissent urges, there are no limits to the Secretary's discretion, if the sole criteria determining Secretarial decisions is merely what puts more money today in the Indian Petitioners' pockets, then Secretarial approval of the issuance of every Indian lease and every communitization agreement is merely illusory--subject only to the appearance of the next higher bidder. Such a rationale is legally insupportable and was properly rejected by the majority of the Court of Appeals.

B. The Intra-Circuit Conflict Issue.

The dissent argues that the Court of Appeals has, by its opinion here, created an intra-circuit conflict with its prior rulings in Kenai and Cheyenne-Arapaho.[22/] Id. at 1044. This argument, Respondents respectfully suggest, is without substance and provides no basis for review.

First, the existence of such a conflict was specifically raised by Petitioners and the Secretary in requesting rehearing en banc before the Court of Appeals. That full Court expressly undertook to review this issue. Woods, 47 F.3d at 1039. After revisiting each of its prior panel decisions, the eight-judge majority, for the entire Court of Appeals, painstakingly reconciled

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21/ The Department of Interior has interpreted its guidelines stating: "There may be times when spacing is not in the best interest of an particular individual in the short term; but the determination to communitize must be based upon the long-term overall conditions of the reservoir." See Cotton, 870 F.2d at 1519.

22/ As for the fourth Secretarial review opinion from the Court of Appeals, Cotton, (having facts virtually identical to those here) the dissent summarily dismisses its applicability. Woods, 47 F.3d at 1046.

their analyses in the four communitization cases claimed as the bases for the conflict. Id. Thus, to the extent that any tension did exist between the rulings of various panels of the Court of Appeals, that tension was resolved by the imprimatur of the entire Court in Woods. See Fed. R. App. P. 35(a); United States v. Hardesty, 958 F.2d 910, 912 (9th Cir. 1992), cert. denied, ____U.S. ____, 113 S. Ct. 1429, 122 L.Ed.2d 797 (1993).

The dissent, again without supporting authority, chooses to disagree with the majority. This choice, however, does not change the fact that no conflict exists, and that the Court of Appeals' opinions are consistent.[23/]

C. The "Inconsistent" Decisions Issue.

The dissent urges that it is perfectly reasonable for the Secretary to reject communitization and then immediately thereafter reverse himself, and approve identical communitization. This position was properly rejected by the Court of Appeals.

23/ Not only did the Court of Appeals reconcile these opinions in issuing its opinion here, but it took a prior similar opportunity to harmonize its analyses in Cheyenne-Arapaho as well, stating:

> [The lessee's] claim is consistent with Cotton, in which we refused to defer to the Secretary's decision since he considered only economic factors, rather that all relevant factors. . . This is not a Cotton situation, however . . . . As per Kenai, our opinion is that those economic factors were indeed relevant and should have been considered . . . . In Kenai, we deferred to the Secretary's decision because he considered economic, conservation and production factors . . . . However, in the case at bar, as in Cotton, we cannot defer since the Secretary did not consider all relevant factors.

966 F. 2d at 591 n.14 (citations omitted). Certiorari on this issue was declined by this Court. Woods Petroleum Corp. v. Cheyenne-Arapaho Tribes of Oklahoma, ___ U.S. ___ 113 S. Ct. 1642, 123 L. Ed. 2d 265 (1993).

In Cotton, the Secretary disapproved communitization of the production unit to the extent that it would result in termination of the existing Indian lease, but approved inclusion of the Indian tract in the same unit as an unleased tract once his initial disapproval had the intended effect of triggering lease termination. Cotton, 870 F.2d at 1527. Here, once again, the Secretary initially rejected communitized development but subsequently reversed that decision, after triggering lease termination, by including new Indian leases acquired by Petitioner Tomlinson in a virtually identical plan of communitized development.[24/]

The Court of Appeals, both in Cotton and here, was rightly concerned over the irreconcilability of the Secretary's decisions first rejecting, and then approving, identical communitized operations.[25/] In Cotton, the Court of Appeals stated: "To reject the communitization agreement and then immediately to affirm it and to award the Rose Appellees retroactive benefits under it exposes the arbitrary and capricious nature of the Secretary's

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24/ The plan subsequently approved by the Secretary covered the same lands and was made effective retroactive to a date prior to first production from the unit from the well drilled by Woods. In economic effect, this plan of development was identical to that proposed by Woods and summarily rejected by the Secretary.

25/ Petitioners have argued that just such a result is endorsed in Kenai. This conclusion ignores the Court of Appeals' limiting analysis of Kenai in Cotton:

> [In Kenai] the Secretary . . . was not taking inconsistent positions as to whether the Indian lessor was in or out of the communitization unit. Rather, the Secretary in Kenai refused to approve the communitization agreement for any purpose. We were not faced [in Kenai] with a situation where the Secretary was seeking simultaneously to free the Indian lessor from the burdens of the communitization agreement while retaining for the Indians its benefits.

Cotton, 870 F.2d at 1528 n.4.

action." Cotton, 870 F.2d at 1527.[26] Here too, the Court of Appeals specifically found the purpose of the Secretary's actions not to constitute the required evaluation of communitization, but rather, "a mere vehicle to cause the underlying lease to terminate." Woods, 47 F.3d at 1040.

The Court of Appeals' rejection of such inconsistent actions is fully supported by the Secretary's regulations. Under the regulations, the Secretary is given authority to determine whether an Indian lease is to be "subject to a cooperative or unit development plan affecting the leased lands." 25 C.F.R. § 212.24(c). A communitization agreement is the instrument by which such a plan is effectuated. However, the Secretary's decision properly goes to the propriety of communitized development (in this case in 1982), and it is not a choice between virtually identical plans of communitization.

The dissent chooses to ignore the arbitrariness of the Secretary's actions. To the contrary, the dissent suggests that no decision of the Secretary could be arbitrary or an abuse of discretion if it results in additional economic gain to the Secretary's wards. This position is based upon the discredited assertion that the important aspect of Secretarial approval is not whether communitization is proper, but whether underlying leases should continue. The dissent would, thus, turn the administrative process on its head, from an evaluation of the propriety of

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[26] Numerous courts have reached a comparable conclusion where communitization is accomplished by the ratification of voluntary unit agreements. See, e.g., Tide Water Associated Oil Co. v. Stott, 159 F.2d 174 (5th Cir. 1946), cert. denied, 331 U.S. 817, 67 S. Ct. 1306, 91 L. Ed. 1835 (1947); Hunt Oil Co. v. Moore, 656 S.W.2d 634 (Tex. Civ. App. 1983); Superior Oil Co. v. Roberts, 398 S.W.2d 276 (Tex. 1966); Budd v. Ethyl Corp., 251 Ark. 639, 474 S.W.2d 411 (1971); California Co. v. Britt, 247 Miss. 718, 154 So. 2d 144 (1963).

communitized development, to a re-review of underlying lease approval. Such unconstrained administrative conduct could well become the "monster which rules with no practical limits on its discretion." Burlington Truck Lines, 371 U.S. at 167. This suggestion is contrary to the teachings of this Court and was properly rejected by the majority of the Court of Appeals.

CONCLUSION

Based on the foregoing, Respondents, Woods Petroleum Corporation (now Argent Energy Company), Ratex Resources Incorporated, MidCon Central Exploration Company and Mustang Production Company (now Mustang Fuel Corporation), respectfully request that this Court deny the Petition for A Writ of Certiorari of Anna Twins Spottedwolf, Eleanor Stoneroad, Victor Stoneroad, Leroy Stoneroad and Tomlinson Properties, Inc.

Respectfully submitted,

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I the undersigned do hereby certify that on the 8th day of June, 1995, a true and correct copy of the above and foregoing document was forwarded by U.S. Mail, with proper postage thereon fully prepaid, to the following counsel of record:

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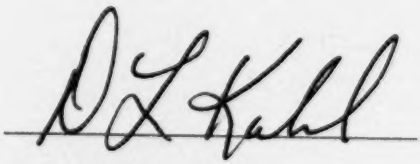

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No. 94-1858

In the Supreme Court of the United States

OCTOBER TERM, 1995

ANNA TWINS SPOTTEDWOLF, ET AL., PETITIONERS

v.

WOODS PETROLEUM CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE DEPARTMENT OF THE INTERIOR IN OPPOSITION

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QUESTION PRESENTED

Whether, in exercising his authority to approve or disapprove proposed agreements to communitize oil and gas leases affecting Indian lands, the Secretary of the Interior may reject a proposed agreement on the ground that it would extend an expiring lease and, thereby, preclude the Indian lessor from obtaining a higher return from a new lease in an improved market.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1858

ANNA TWINS SPOTTEDWOLF, ET AL., PETITIONERS

v.

WOODS PETROLEUM CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE DEPARTMENT OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-1 to 4-96) is reported at 47 F.3d 1032. The opinion of the district court (Pet. App. 2-1 to 2-18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1995. The petition for a writ of certiorari was filed on May 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Under the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a-396g, the Secretary of the Interior is responsible for supervising the leasing of minerals located on lands allotted to Indians. As relevant here, the Act provides that all oil and gas communitization agreements[1] that encompass restricted Indian lands must be approved by the Secretary or his designate. Section 396d of the Act provides in pertinent part:

> In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

25 U.S.C. 396d. Interior Department regulations promulgated pursuant to the Act, 25 C.F.R. 212.24(b), similarly provide that a communitization agreement that affects Indian mineral rights is not effective without the prior approval of the Secretary. This case concerns the grounds on which the Secretary may disapprove such an agreement.

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[1] Under a "communitization agreement," owners of small tracts of land agree that each owner will benefit from a well drilled anywhere within the communitization unit in proportion to the amount of land that the owner contributed to the unit. See, *e.g.*, *Kenai Oil & Gas, Inc.* v. *Department of Interior*, 671 F.2d 383, 384 (10th Cir. 1982); Cristyn Eddy, *Survey, Land and Natural Resources*, 71 Denv. U. L. Rev. 1017, 1018 n.10 (1994).

1. In February 1977, the Superintendent of the Concho Agency of the Bureau of Indian Affairs (BIA) in the Department of the Interior approved three oil and gas leases between the successors in interest to Walking Woman (deceased), as lessors, and the National Cooperative Refinery Association (National) as lessee. Pet. App. 2-3 to 2-4. Each of the leases had a primary term of five years and provided that it would remain in force "as much longer thereafter as oil and/or gas is produced in paying quantities." *Id.* at 4-6. All three leases contained a "commence drilling clause," which stated that if the lessee commenced drilling of a well within the primary term, the term would be extended, provided that the lessee completed the well with reasonable diligence, and oil or gas was found in paying quantities. *Id.* at 4-6 & n.1. A section of each lease addressed communitization agreements. That section provided that the parties would abide by "any agreement for the cooperative or unit development of the field or area, * * * if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior." *Ibid.* The BIA subsequently approved National's assignment of the leases to respondents. *Id.* at 4-7.

2. The primary terms of the leases were to expire on February 25 and 28, 1982, unless extended by production or communitization. On January 5, 1982, respondent Woods Petroleum Corporation (Woods) commenced drilling of a well on non-Indian lands in the area, and circulated to the other working-interest owners in the area a proposed communitization agreement. In conjunction with the "commence drilling clause" and the ongoing drilling, the communitization clause, if put into effect, would have extended the

terms of the 1977 leases. After obtaining the approval of the majority of working-interest owners, Woods submitted the agreement to the Minerals Management Service of the Department, which recommended approval. Pet. App. 2-5 to 2-6, 4-7.

The proposed agreement was transmitted to the BIA's Anadarko office on February 22, 1982. On the same day, several Indian owners of mineral interests on the leased property delivered objections to the BIA. They maintained that, in light of improved market conditions, it would be in their best interest for the BIA to reject the proposed communitization agreement and allow the leases to expire so that they could negotiate new leases on better terms. Pet. App. 2-6 to 2-7. Nevertheless, on April 12, 1982, the Acting Area Director approved the communitization agreement submitted by Woods. On September 10, 1982, Woods completed its well on non-Indian lands. *Id.* at 2-7.

The Indian mineral owners filed an administrative appeal from the Acting Area Director's decision. During the pendency of the administrative appeal, the Oklahoma Corporation Commission authorized Woods to drill two more wells on non-Indian land within the proposed communitization unit. Royalties from the production of those wells were held in escrow by the Department of the Interior during the appeal. Pet. App. 2-7 to 2-8, 4-9 n.3, 4-10 n.4.

3. While the Department was reviewing the communitization agreement, the court of appeals issued an opinion in a case raising similar issues, *Kenai Oil & Gas, Inc.* v. *Department of Interior*, 671 F.2d 383 (10th Cir. 1982). In *Kenai*, the court upheld the Department's refusal to approve communitization of several Indian oil and gas leases, where the refusal

was based on the fact that "the leases, which had remained unproductive for nearly ten years, could be released for higher royalty payments and bonuses." *Id.* at 387. The *Kenai* court emphasized the Secretary's fiduciary duty to "maximize [Indian] lease revenues," and the absence in the relevant statute and regulations of any provision precluding the Secretary, in disapproving an agreement, from relying on the economic value of re-leasing opportunities. *Id.* at 386. The court, moreover, expressly rejected the lessee's claim that the Secretary was limited to considering matters of conservation and production in deciding whether to approve a communitization agreement. *Id.* at 387.

In response to *Kenai*, the Department issued general guidelines governing the approval of communitization agreements.[2] The guidelines state that the Secretary has discretion to approve or disapprove communitization agreements based on a determination whether approval would be in the best interests of the Indian lessor. In making that determination, the Department is directed to consider: (a) whether the long-term economic effects of the agreement are in the best interest of the Indian lessor; (b) whether, in the judgment of the Interior Department's Minerals Management Service, engineering and technical aspects of the agreement protect the interests of the Indian lessor; and (c) whether the lessee has complied with the terms of the lease. See Pet. App. 4-20.

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[2] Those unpublished guidelines are set out in pertinent part in *Cotton Petroleum Corp.* v. *United States Dep't of Interior*, 870 F.2d 1515, 1517-1518 (10th Cir. 1989).

4. In the instant case, the Deputy Assistant Secretary for Indian Affairs, before whom the Indians' administrative appeal was pending, requested that the Anadarko Area Director provide further information regarding the best interests of the Indian lessors, including prospects for new leases on the land. The Area Director expressed the opinion that approval of the agreement was in the best interests of the lessors. Pet. App. 4-11 to 4-12. The Area Director's analysis was predicated on the assumption that the subject tracts could not profitably be released. See I C.A. App. 117 ("under the present market and economic conditions, the prospect of releasing * * * is not very good"). The Deputy Assistant Secretary circulated that analysis for comment by Woods and the Indian lessors. The Indian lessors' response pointed out that the Area Director's analysis rested on an incorrect factual assumption, because there did in fact exist a potential lessee who was willing to lease the Indian lessors' mineral interests on more lucrative terms. *Id.* at 119.

On May 15, 1986, the Assistant Secretary for Indian Affairs issued his decision, concluding that the Area Director had not acted in the best interests of the Indians in approving communitization. Pet. App. 1-1 to 1-22. Rejecting Woods' claim that disapproval of the agreement would "discourage investors" and "drive away" prospective lessees, the Assistant Secretary noted that a potential lessee (petitioner Tomlinson Properties, Inc.) had offered to pay more than $400,000 in bonuses for new leases on the three tracts. *Id.* at 1-9 to 1-10, 4-12. Observing that *Kenai* held that the Department has a "duty to maximize [Indian] lease revenues," see 671 F.2d at 386, the Assistant Secretary concluded that expiration of the

1977 leases, in light of the definite prospect of new, more lucrative leases, was in the Indians' best interests. Pet. App. 1-10 to 1-11. Accordingly, the Assistant Secretary disapproved Woods' communitization agreement and issued an order declaring that respondents' leases had expired for failure to drill, produce, or communitize during the primary terms. *Id.* at 4-12. Soon thereafter, the Indian lessors and petitioner Tomlinson entered into new leases, which provided for more than $400,000 in bonuses. The Department approved those leases. Tomlinson then submitted a new communitization agreement, retroactive to September 1, 1982, which was approved by BIA's Area Director on September 22, 1986. *Id.* at 2-10 to 2-11, 4-12 to 4-13.

5. On July 28, 1986, Woods filed this action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, seeking to have the Department's decision set aside. On February 22, 1988, the district court upheld the Department's rejection of communitization (Pet. App. 2-1 to 2-18), relying principally on *Kenai*. See *id.* at 2-15.

6. While the appeal of this case was pending, the court of appeals issued opinions in two other cases, taking seemingly conflicting approaches to the question whether the Department may reject communitization on the grounds at issue here. In *Cotton Petroleum Corp.* v. *United States Dep't of Interior*, 870 F.2d 1515 (10th Cir. 1989), the Department had rejected a proposed communitization agreement submitted at the end of a lease's primary term, so that the Indian lessor could take advantage of the improved market for leases in the Anadarko area. The district court found that the Department's action was consistent with *Kenai*, but the court of appeals

reversed, holding that the Secretary acted arbitrarily and capriciously when he "refused to approve an otherwise fair and proper communitization agreement for the *sole purpose* of causing the underlying lease * * * to expire." *Id.* at 1528.

Subsequently, a different panel of the court of appeals held that the Department had breached its fiduciary duty to a Tribe by approving communitization without fully considering the possibility that allowing old leases to lapse might lead to more lucrative new leases. In *Cheyenne-Arapaho Tribes of Oklahoma* v. *United States*, 966 F.2d 583 (10th Cir. 1992), cert. denied, 113 S. Ct. 1642 and 1643 (1993), the court repeated *Kenai*'s admonition that the Secretary has a fiduciary "duty to maximize lease revenues." 966 F.2d at 589 (quoting *Kenai*, 671 F.2d at 386). The Secretary had concluded in *Cheyenne-Arapaho* that disapproval of the proposed agreements would not have been in the Tribe's economic interest because "it was unlikely that new leases would have been negotiated." 966 F.2d at 590. The *Cheyenne-Arapaho* court found, however, that the Secretary "was not free to conclude, without some consideration of the present market conditions, that new leases would be as difficult to negotiate as they would have been in pre-boom times." *Id.* at 591. The court therefore concluded that the "Secretary and his delegates breached their fiduciary responsibilities to the Tribe by failing to consider the market conditions in the Anadarko Area during the 1980's." *Ibid.*

7. On March 7, 1994, a panel of the Tenth Circuit reversed the district court's decision in this case. *Woods Petroleum Corp.* v. *United States Dep't of Interior*, 18 F.3d 854. The panel, relying on *Cotton Petroleum*, held that it was arbitrary and capricious

for the Department to reject communitization for the purpose of allowing the Indian lessors to benefit from the booming market for natural gas in the Anadarko area. The Department, the Indian allottees, and Tomlinson filed petitions for rehearing with suggestions of rehearing en banc, citing the conflict between the panel decision and *Cotton Petroleum*, on the one hand, and *Cheyenne-Arapaho* and *Kenai*, on the other. The full court granted rehearing en banc.

8. The en banc court reached essentially the same result as the panel, with two judges dissenting. Pet. App. 4-1 to 4-96. The majority held that it was an abuse of discretion for the Secretary to reject a communitization agreement "for the sole purpose of causing the expiration of a valid Indian mineral lease and allowing the Indian lessors to enter into a new, more lucrative, lease," where the Secretary then "approves essentially the identical communization [*sic*] agreement, with the new lessee * * * simply substituted for the old lessee." *Id.* at 4-5; see generally *id.* at 4-17 to 4-36.

The court distinguished *Kenai* on the grounds that there, "productive wells had been drilled directly on the Indian land and there was no suggestion that the new lease would be pooled with neighboring tracts"—*i.e.*, the Secretary did not disapprove the proposed communitization agreement with the intention of approving an essentially identical agreement under a new lease. Pet. App. 4-25 to 4-26. The court distinguished *Cheyenne-Arapaho* on the ground that communitization in that case "involved only Indian land, and wells had already been drilled on several of the Indian leases." *Id.* at 4-27. *Cheyenne-Arapaho*, the majority concluded, held simply that the Secretary should have considered the economic value

of new leases, based on changed market conditions. *Ibid.*

Judge Henry, joined by Chief Judge Seymour, dissented, concluding that the Secretary's action in this case was consistent with his fiduciary duty to protect the Indian lessors' economic interests. Pet. App. 4-36 to 4-96. The dissenters asserted that nothing in the relevant statute or regulations prevents the Secretary from considering the manner in which a proposed communitization agreement may affect underlying leases. *Id.* at 4-43 to 4-45. They also believed that, by making the validity of the Secretary's approval or disapproval of a communitization agreement dependent on the existence and disposition of subsequent agreements, the majority's reasoning "deprives [the Secretary] of objective standards that might offer him some guidance as to whether he is making a proper decision at the time he is required to make it." *Id.* at 4-92.

ARGUMENT

We agree with the dissenting judges below (Pet. App. 4-55) that the Tenth Circuit's decisions in *Cotton Petroleum* and the instant case on the one hand, and *Kenai* and *Cheyenne-Arapaho* on the other, present "contrasting principles" regarding the Secretary's obligations under the Indian Mineral Leasing Act. Nonetheless, because the holding in this case is narrow, and because the potential conflict is limited to the Tenth Circuit, further review is not warranted.

Because the Tenth Circuit did not overrule or limit its prior decisions in *Kenai* and *Cheyenne-Arapaho*, the Secretary must continue to consider the economic benefit that Indian lessors would obtain by

disapproval of a proposed communitization agreement and re-leasing under improved market conditions. Pet. App. 4-55. At the same time, however, the Secretary's rejection of a communitization agreement based on that consideration will not be valid under the majority's reasoning if the parties subsequently submit, and the Secretary approves, a similar agreement that covers the Indian lessor and a new lessee. As the dissenting judges noted below (Pet. App. 4-90), by making the validity of the Secretary's action dependent on subsequent events that are frequently beyond his ability to predict, the court's ruling places the Secretary in a "precarious position" where improved market conditions make the prospect of re-leasing attractive.

Although, in our view, the court of appeals' reasoning is flawed, its precise holding in this case is narrow. The court held that

> the Secretary acts arbitrarily and abuses his discretion under § 396d when he (1) rejects a proposed communitization agreement for the sole purpose of causing the expiration of a valid Indian mineral lease and allowing the Indian lessors to enter into a new, more lucrative, lease, and then (2) approves essentially the identical communitization agreement, with the new lessee of the Indian lands simply substituted for the old lessee, and permits the Indian lessors to collect royalties retroactively to the date of first production under the original unit plan.

Pet. App. 4-4 to 4-5. Cf. *id.* at 4-89 (Henry, J., dissenting) (characterizing the majority's holding as "fact-specific"). The decision below therefore appears to leave the Secretary free to disapprove a communi-

tization agreement based on all relevant factors, including the benefit to Indian lessors of a new lease, where he does not subsequently approve a similar communitization agreement under the new lease. *Id.* at 4-25 to 4-26. Contrary to petitioners' contention (Pet. 9), the decision will not in most cases prevent the Secretary from considering, and acting to protect, the economic interests of Indian lessors.

To date, the issue presented in this case has arisen only in the Tenth Circuit. Indeed, three of the four Tenth Circuit cases that have addressed this question (*Cotton Petroleum*, *Cheyenne-Arapaho*, and the instant case) arose from the same natural gas boom market that existed in the Anadarko, Oklahoma, area in the early 1980s. The arguable existence of an intra-circuit conflict regarding the Secretary's obligations under those market conditions does not warrant this Court's review. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Finally, petitioners contend (Pet. 10) that the court of appeals' decision "conflict[s] with applicable decisions of this Court." Petitioners fail, however, to identify any particular decision of this Court with which they believe the instant case is in conflict. The dissenting opinion below, on which petitioners rely (*ibid.*), argues only that the majority erred in applying this Court's administrative law decisions to the facts of this case. See, *e.g.*, Pet. App. 4-76 to 4-77. That argument, though correct in our view, does not warrant this Court's plenary consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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